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# IS THE RENVOI A PART OF THE COMMON LAW?

BY

EDWIN H. ABBOT, JUNIOR

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# IS THE *RENVOI* A PART OF THE COMMON LAW?

SUPPOSE that *A* dies leaving movables in England, that according to English law his last domicil was French, and that according to French law his last domicil was English. Assuming that England will apply the law of *A*'s domicil at the time of *A*'s death, by what law will England distribute these movables? If the Common Law reject the *renvoi* (a noun coined from the French verb *renvoyer* to describe a doctrine which has excited much controversy in the Civil Law), England will consider irrelevant the French conclusion as to *A*'s domicil and will apply the French Statute of Distributions immediately. If, however, the Common Law include the *renvoi*, England will accept the French conclusion as to *A*'s domicil and permit France to send back the case to English law for farther determination. Or, to put the problem in another fashion, rejection of the *renvoi* implies but one application, acceptance of the *renvoi* two or more applications of the rules of private international law to the distribution of these movables. Which view is supported by principle and authority?

It is generally conceded, by Common Law writers at least, that the law of each country is supreme within its own territory[1]. Hence the law of one country can have no effect, *proprio vigore*, in the territory of another. From this it follows that whatever effect the laws of one country have in another depends solely on the laws of the latter. Examples are numerous both in English and American law. Thus the law of the situs determines the effect upon real estate of transactions, occurring either within or without the country[2]. In the normal case a court cannot get personal jurisdiction of an absentee by publication[3]. Equity, though it has jurisdiction of the parties, will usually refuse to decree the performance of an affirmative act in a foreign jurisdiction[4]. A personal judgment has no force, as such, outside the state where it was rendered, and if action be brought thereon in another state, it lies

[1] Story, Conf. of Laws, sec. 18, 20, 23; 1 Wharton, Conf. of Laws, ch. 1; Dicey, Conf. of Laws, Introduction; *Mahorner* v. *Hooe*, 9 Smedes & Marshall (Mississippi) 247; *Despard* v. *Churchill*, 53 N.Y. 192; *Succession of Petit*, 49 La. An. 625; *Cooper* v. *Beers*, 143 Ill. 25. *Contra*, Westlake, Priv. Int. Law, Introduction.

[2] *Duncan* v. *Lawson*, 41 Ch. D. 394; *Clark* v. *Graham*, 6 Wheat. (U.S.) 577.

[3] *Buchanan* v. *Rucker*, 9 East 192, 9 R. R. 531; *Pennoyer* v. *Neff*, 95 U.S. 714.

[4] *Carteret* v. *Petty*, 2 Swanst. 323; *Watkins* v. *Holman*, 16 Pet. (U.S.) 25.

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with the latter to determine whether it will effectuate it or not[1]. A penal statute has no effect extra-territorially[2]. Service of a writ outside the state imposes no duty[3]. Other instances might be given, but these are enough to show the territorial character of law. This, in the last analysis, rests upon power. The enactment of a law-giver is binding within the territory because he can make it good with the strong hand if necessary. It has no inherent force in other countries because one sovereign has not the physical power to act as such in the territory of another.

It is generally settled both in England and America that the law of the situs will regulate the succession to movables according to the law of the country where the owner was domiciled at the time of his death. If he died testate that law governs the validity of his will[4]. If he died intestate it determines how distribution shall be made[5]. Historically the rule seems to have been derived from the maxim *Mobilia sequuntur personam*, though jurists differ as to the mode[6]. Of its practical utility, however, there is no doubt. If the deceased left movables in several countries, and these agree as to his last domicil, the succession thereto is regulated by one law instead of by several. This permits the estate to devolve as a unit instead of in fractions. In practice the court may proceed in either of two ways. Each country may hand over the movables to the country of the domicil, to be dealt with there, or else it may ascertain the law of the domicil and administer it accordingly[7].

Whichever course is adopted the first step is to ascertain the last domicil of the deceased. But domicil is itself a mixed question of law and fact. It may be shortly defined as an inference drawn by law from residence coupled with the appropriate intent[8]. It must therefore be ascertained with reference to some law. This, on principle, should be the law of the situs of the movables. That law is about to effectuate some foreign law which it must now identify. Domicil is the earmark of the foreign law in question. Clearly, then, the law of the situs must lay down the criteria by which this earmark is to be recognized, and determine what facts meet the test which it has just prescribed. Domicil, therefore, is to be ascertained

[1] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670; *Nouvion* v. *Freeman*, 15 App. Cas. 1; *Bischoff* v. *Wethered*, 9 Wall. (U. S.) 812; *Hilton* v. *Guyot*, 159 U. S. 113.

[2] *Com.* v. *Lane*, 113 Mass. 458; *Huntington* v. *Attrill* [1893] A. C. 150; *Huntington* v. *Attrill*, 146 U. S. 657.

[3] *Permanent Building, &c. Co.* v. *Hudson*, 7 Queensland, L. J. 23.

[4] *Enohin* v. *Wylie*, 10 H. L. C. 1; *Talbot* v. *Chamberlain*, 149 Mass. 57; *Dupuy* v. *Wurts*, 53 N. Y. 556.

[5] *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Wilkins* v. *Ellett*, 108 U. S. 256.

[6] Story, sec. 374-81; Westlake, pp. 177-84.

[7] Dicey, pp. 678, 679.

[8] *Udny* v. *Udny*, 1 H. L. Sc. 441; *Wilbraham* v. *Ludlow*, 99 Mass. 587

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with reference to the law of the situs, and with reference to that law only [1]. In other words, if English law, as the law of the situs, find that the deceased is domiciled in France, it is quite immaterial that France, on the same facts, would find that he is domiciled in England.

When, therefore, the law of the situs has ascertained the last domicil of the deceased, the next step is to ascertain the 'law of the domicil.' With reference to the law of the situs the rules of foreign law are facts, and are proved as such by evidence [2]. The law of the situs will incorporate one or more of these rules. It first, therefore, must determine what foreign rules are applicable to the case at hand, or, to put the matter another way, which of these facts are relevant and material. In other words, the question becomes, what meaning does the law of the situs put upon the term 'law of the domicil'?

The law of any country may be divided into two parts, (*a*) those rules which deal with the creation, nature, and enforcement of rights, which may be termed its 'internal' law, (*b*) those rules which determine what national law is to be applied to the question at issue, which may be termed its 'private international' law [3]. The words 'law of the domicil' do not point definitely to any one of these three. So far as construction goes, they may mean, (1) the 'whole' or territorial law of the domicil, which would include both its 'internal' and its 'private international' law, (2) the 'internal' law of the domicil only, (3) the 'private international' law of the domicil only. But construction is only the first step. Farther analysis shows that there are only two real possibilities. Since the 'internal' law deals directly with rights, and 'private international' law determines what territorial law shall deal with such rights, the application of one excludes the simultaneous application of the other. A concrete case will make this clearer. Suppose, as before, that *A* dies, leaving movables in England, that according to English law he is domiciled in France, but that according to French law his domicil is English. According to English law the law of France is the 'law of the domicil.' If the 'internal' law of France is incorporated the court has only to distribute the movables in accordance therewith, which, of course, passes over the question

[1] *Collier* v. *Rivaz*, 2 Curt. Eccl. 855; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Re Brown-Sequard*, 70 L. T. (N. S.) 811; *Hamilton* v. *Dallas*, L. R. 1 Ch. 257; *Re Martin* [1900] P. 211, per Lindley M. R.; *Harral* v. *Harral*, 39 N. J. Eq. 279; Dicey, 113; 1 Wharton, 157. *Contra*, *Re Johnson* [1903] 1 Ch. 821; *Re Bowes*, 22 T. L. R. 711. See *Dupuy* v. *Wurtz*, 53 N. Y. 556, 570; Westlake, p. 326.

[2] *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Haven* v. *Foster*, 9 Pick. (Mass.) 112.

[3] Story, sec. 18, 20, 23; 1 Wharton, ch. 1; Dicey, Introduction. But see Westlake, Introduction, and ch. 2.

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as to what national law France would apply under the circumstances. If, on the other hand, French 'private international' law be incorporated, that designates English law as the 'law of the domicil,' which, of course, excludes the *direct* application of the French rule of succession. It follows, therefore, that the law of the situs cannot *directly* incorporate the 'whole' law of France, since this includes both French 'internal' and French 'private international law.'

It is not true, of course, that every application of French private international law must of necessity exclude *permanently* an application of French internal law. If French private international law point to French internal law, under the circumstances, the law of the situs might incorporate that as the ultimate rule. This, indeed, is one explanation of what happens in the normal case where both England and France are agreed that the intestate is domiciled in France and the French Statute of Distributions is effectuated by England. But this is not *direct*, but *consequential*, incorporation of French internal law. It takes place directly by virtue of French private international law and remotely by virtue of the law of the situs. Since, therefore, the law of the situs will incorporate the 'law of the domicil,' and since it cannot directly incorporate the whole, the choice must lie between the internal, and the private international, law thereof. In other words, the issue is, will the private international law of the situs effectuate the private international law, or the internal law, of the domicil?

A concrete case will test the question on principle. Suppose, as before, that England is the country of the situs, that according to English law the deceased died domiciled in France, that according to French law he was domiciled in England. Suppose, moreover, that the *renvoi* obtains in each country, that is, that each country incorporates the private international law of the domicil. The result is a square deadlock. England designates French law as the law of the domicil, France immediately designates English law as the law of the domicil. This brings the case to the starting point, and the process may be repeated forever without reaching a rule of succession. Logically there is the same deadlock even in the simplest case where both situs and domicil are English. English private international law is *ex hypothesi* to incorporate the private international law of the domicil only. The domicil is ascertained to be English. The result is that English private international law effectuates English private international law. Again the process may be repeated indefinitely without coming to a conclusion.

It is urged, however, by Mr. Westlake, that when England has determined the domicil to be French, but France has declined to

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accept this conclusion, and determined that the domicil is English, France thereby washes its hands of the case, and French law may thereafter be disregarded[1]. This, if sound, would avoid the *circulus inextricabilis* which the *renvoi* seems logically to involve, by stopping it after the first reference back. It is, however, equivalent to making French law, when invoked as the law of the domicil, incorporate English internal law instead of English private international law. The same solution would have to be applied in the reverse case where the movables are situated in France. That would make English law, when invoked as the *law of the domicil*, incorporate French *internal* law. But if the *renvoi* be a part of English law, English law, when invoked as the *law of the situs*, effectuates French *private international* law. It is difficult to see how the name under which English law is invoked can reconcile two rules otherwise squarely opposed. Logically, therefore, this modification seems unsound.

Nor is this all. Both the full-blown *renvoi* and the modified *renvoi* supported by Mr. Westlake are in conflict with the principle of *res judicata*. The law of the situs is supreme. Domicil has been ascertained with reference to that law. This question of domicil, therefore, is *res judicata* as to the case at the bar. Yet if law of the situs effectuate the private international law of the domicil, this question must be immediately reopened and resettled with reference to the latter. It is difficult to see how such a rule can be supported on principle, or in the face of the great weight of authority, which holds that domicil is to be ascertained with reference to the law of the situs only[2].

Principle, then, unless controlled by a hopeless weight of authority, would reject the *renvoi* as a part of the Common Law. This by a process of exclusion points to the internal law of the domicil as the law to be effectuated. To this none of the objections to which the *renvoi* is peculiarly open can be urged. It involves no *circulus inextricabilis* since it involves no national conflict as to domicil. For the same reason it is not opposed to the principle of *res judicata*. Nor is it in conflict with the rule that domicil is to be ascertained with reference to the law of the situs, and with reference to that law alone. It is, therefore, as simple as the *renvoi* is difficult. It is equally applicable whether the deceased was domiciled at home or abroad, and whether the two countries differ as to his domicil or not. It is true that if there be a national difference as to domicil, the movables cannot devolve as a unit if they are situated in both countries. Thus if there are movables in France and England, and each country insists that deceased was

[1] Westlake, ch. 2.

[2] See p. 5, note 1.

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domiciled in the other, the English movables will pass according to French law, the French movables according to English law. But the *renvoi* does not obviate the difficulty. If it be carried to its logical conclusion the property, as a unit, does not devolve at all, and if, to escape that difficulty, the *renvoi* be stopped after one reference back, unity of devolution is destroyed, for in that case the French movables pass by French law, and the English movables by English law. On principle, therefore, the law of the situs should incorporate the internal law of the domicil. The question therefore becomes, is the *renvoi* so firmly engrafted in the Common Law that the argument from authority is conclusive, even in the face of principle?

As has been shown, the *renvoi*, if logically carried out, involves a perpetual deadlock. But both England and America try the validity of a will of personalty by the law of the testator's last domicil[1]. And if the deceased died intestate his movables are in fact distributed in accordance therewith[2]. In other words, the Courts reach a result in both cases. Authority, therefore, is squarely opposed to carrying the *renvoi* to its logical conclusion.

But does authority support the *modified renvoi*, that is if it be stopped after one reference back? In *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441, where both the situs of the movables and the domicil of the deceased were English, it was held that English law determines the validity of the will. Here the result would be the same whether the *modified renvoi* or the internal law of the domicil be applied. But it must be reached by one method of reasoning or the other. If therefore this class of cases be claimed upon the reasoning, either as supporting, or as consistent with, the *modified renvoi*, its supporters must show that when English private international law was invoked as the law of the situs, it effectuated English private international law as the law of the domicil, but that when English private international law was invoked as the law of the domicil, it effectuated English internal law, since these are the steps dictated by the modified *renvoi* itself. Yet neither this case (which is simply selected as a type of both English and American decisions on similar facts) nor any other which the writer has discovered expressly proceeds on this reasoning. On the contrary, when the court has once ascertained domicil, it addresses itself to the internal law thereof without more. The same is true (so far as the writer knows) of decisions like *De Bonneval* v. *De Bonneval*, 1 Curt. Eccl. 856, where the validity of a will disposing of English movables, made by one domiciled in France (and upon this both English and French law agreed), was tested by

[1] See p. 4, note 4. [2] See p. 4, note 5.

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French law. This class of cases differs from the last only in the fact that the undoubted domicil of the deceased is foreign, instead of in the country of the situs. Here, also, the court, after deciding that the French domicil of origin continued till the testator's death, turns directly to French internal law. While, therefore, the *decision* in both classes of cases leaves the question open, the way in which the courts reach that decision seems opposed even to the modified *renvoi*.

Mr. Westlake, however, contends that the modified *renvoi* is established by the weight of authority [1]. But he conceives of private international law as a part of the law of nations, rather than of the territorial law of each country [2]. In other words, his view appears to be that for every case there can be but one rule of private international law, and that the rules laid down by each nation are but evidence from which the true rule may be deduced [2]. Thus in considering whether the *renvoi* is a part of English law he ascertains whether Italy, France, and Germany accept or reject it [1]. And having concluded that the weight of Continental authority is in favour of it, he then looks to see whether the English cases are opposed to the rule so established. This, of course, leads him to minimize the effect of cases difficult to reconcile with the rule, and to lay great stress on any features tending to bring England into accord therewith. Since, moreover, he does not concede the territorial supremacy of each nation in regard to the rules of private international law, he does not feel in regard to the *renvoi* the difficulties in principle, which beset those who accept territorial supremacy as a fundamental concept. To the latter, of course, foreign authority is persuasive only, and shows nothing as to English law. Mr. Westlake's contention, therefore, must be tested with reference to the English cases alone.

The English cases cited by Mr. Westlake to support the *renvoi* (p. 38) may be divided into four groups:—(*a*) *De Bonneval* v. *De Bonneval*, 1 Curt. Eccl. 856; *Hare* v. *Nasmyth*, 2 Add. 25; *Frere* v. *Frere*, 5 Notes of Cases, 593; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; *Onslow* v. *Cannon*, 2 Sw. & Tr. 137; *Laneuville* v. *Anderson*, 2 Sw. & Tr. 24. (*b*) *Re Trufort*, 36 Ch. D. 600. (*c*) *Collier* v. *Rivaz*, 2 Curt. Eccl. 855; *Re Brown-Sequard*, 70 L. T. (N. S.) 811. (*d*) A dictum in *Re Johnson* [1903] 1 Ch. 821. In group (*a*) the typical case is *Hare* v. *Nasmyth*, *supra*, where the movables were in England, and both England and Scotland agreed that the deceased was domiciled in Scotland. A will had been there offered for probate, and the English court thereupon stayed proceedings to

[1] Westlake, ch. 2. [2] Westlake, Introduction.

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await the Scotch decision. This is simply the usual case, like *De Bonneval* v. *De Bonneval* and *Crookenden* v. *Fuller*, which have been already discussed. The decision would be the same whether the *renvoi* be accepted or rejected. Neither in this case, nor in any of the others is the *renvoi* referred to. Nor does the court reascertain domicil with reference to the foreign law, which is the very essence of the *renvoi*. When once domicil has been ascertained the substance of the reasoning is that the court of the situs will do what the court of the domicil would do under the circumstances. But this seems to point to the internal law of the domicil rather than to the *renvoi*. There is, admittedly, no national conflict as to domicil. The main issue is as to the foreign rule of succession. Of this the decisions of the court of the domicil are manifestly the best evidence. The court of the situs, therefore, should accept them as conclusive upon the question as to what the foreign law is[1]. That, however, does not mean that the foreign law, when so ascertained, is to be effectuated without question. Indeed the rule that the court of the situs will do what the court of the domicil would do under the circumstances is subject to two well-recognized limitations.

In the first place the court of the situs will not follow the court of the domicil in matters repugnant to public policy[2]. Thus in *Mahorner* v. *Hooe*, 9 Smedes & Marshall (Mississippi) 247, one domiciled in Virginia, by a will valid in all respects by Virginia law, directed the emancipation of certain slaves in Mississippi. This was forbidden by a Mississippi statute. *Held*, that this part of the will will not be effectuated. Similarly in *Despard* v. *Churchill*, 53 N. Y. 192, the court declined to effectuate a trust of New York personalty, valid by the law of the testator's domicil (California), because it conflicted with the New York rule against perpetuities. In *Dammert* v. *Osborn*, 140 N. Y. 30, the principle was again affirmed, though the bequest was held not in conflict with public policy owing to special circumstances. In the same way, in *Succession of Petit*, 49 La. An. 625, the Louisiana court declined, because such succession was contrary to Louisiana public policy, to permit the bastard child of one domiciled in France to succeed to Louisiana movables, though having been acknowledged by his father, he would be entitled by French law to one-half of the movables of the deceased. The precise case (so far as I can discover) has not arisen in England, though the principle is recognized by both courts and text writers. There is, however, an interesting analogy in the case

[1] See *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Forepaugh* v. *D. L. & W. R. R. Co.*, 128 Pa. 217.

[2] Wharton, sec. 565; Dicey, p. xliii; Story, sec. 464, 472 (a).

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of *bona vacantia*. In *Barnett's Trusts*, [1902] 1 Ch. 847, it was held that where one domiciled in Austria died leaving no personal representatives entitled to take according to Austrian law, a fund in England passed to the English Crown by virtue of English law, though by Austrian law it would have gone to the Austrian Crown. These cases, therefore, point strongly to the conclusion that the rule in question (that the court of the situs will do what the court of the domicil would do under the circumstances) is not a rule of substantive law, but a rule of evidence. The court of the situs accepts the decision of the court of the domicil as final as to what the law of the domicil is, but declines to effectuate it if contrary to public policy.

In the next place two English cases squarely hold that the law of the domicil *at the time of the death*, unaffected by subsequent retroactive legislation, is the law which will be applied. Thus in *Lynch* v. *Provisional Government of Paraguay* (1871) 2 P. & D. 268, Penzance, the Provisional Government of Paraguay sought the English movables of one who had died domiciled in Paraguay, by virtue of a law, passed since the death, which gave them to the state. The English court declined to effectuate this law and upheld the will of the deceased. The rule was again applied in *Re Aganoor's Trusts* (1895) 64 L. J. (N. S.) Ch. 521, Romer. In neither case was there any question as to the validity of the retroactive law in the country where it was enacted. The court of the domicil would, therefore, have been bound to enforce it. If then the court of the situs is to do what the court of the domicil would do under the circumstances, it also would have to effectuate the law in question. Yet this is precisely what the court of the situs declined in these cases to do. These cases, therefore, confirm the evidentiary character of the rule. If the court of the situs effectuates foreign law it will follow the court of the domicil, but this leaves open whether it will effectuate foreign law or not. In the light of these cases, therefore, the reasoning of the cases in group (*a*) gives the *renvoi* no more support than do the decisions.

Both these lines of authority, moreover, bear strongly against the *renvoi*. True, they do not distinguish between the private international law and the internal law of the domicil, since that question is not presented. But as we have seen, the *renvoi* if carried to its logical conclusion produces a deadlock between the law of the situs and the law of the domicil. Equality of force, however, is requisite for a deadlock. The full-blown *renvoi*, therefore, must be based on a supposed equality between the law of the domicil and the law of the situs. But clearly if the law of the domicil yields to the public policy of the situs it cannot be equal thereto.

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These cases establish the supremacy of the law of the situs. They are, therefore, fatal in principle to the supposed equality between the law of the domicil and the law of the situs on which the full-blown *renvoi* must rest. They are, moreover, equally opposed to the modified *renvoi*. This, as we have seen, gives to the private international law of the domicil the last and controlling word as to what internal law shall regulate succession to the movables. In effect, therefore, it makes the law of the domicil supreme. But these cases emphasize the supremacy of the law of the situs at the very moment when it applies the law of the domicil. They are, therefore, fatal in principle to any theory which requires as a basis that the law of the domicil be either the equal or the superior of the law of the situs.

The next case cited by Mr. Westlake in favour of the *renvoi* is *Re Trufort*, 36 Ch. D. 600. Here one born a British subject became naturalized in Switzerland, and died domiciled in France, leaving movables in France, Switzerland, and England. His will was first offered for probate in the French Court, which finding that his nationality was Swiss, remitted it (in accordance with a treaty) to the Court of Switzerland. There the matter was fully litigated between the parties to the later English suit, and the son of the deceased (the English plaintiff) declared entitled to nine-tenths of the estate as his compulsory portion, as against the sole legatee under the will (the English defendant). The present action is brought to enforce the Swiss judgment as to the English movables of the deceased. *Held*, that the Swiss judgment concludes these parties. The facts, at most, show an interesting case of *renvoi* as between France and Switzerland, but that proves nothing as to English law. Nor is it material that indirectly this *renvoi* is effectuated by giving effect to the Swiss judgment. Since the time of Lord Ellenborough, England has enforced, without reference to the merits of the case, the judgment of a competent tribunal which had jurisdiction [1]. The present case, therefore, is an example not of *renvoi* but of *res judicata*.

The next group of cases cited by Mr. Westlake consists of *Collier* v. *Rivaz*, 2 Curt. Eccl. 855, and *Re Brown-Sequard*, 70 L. T. (N. S.) 811. In *Collier* v. *Rivaz*, the testator, who was domiciled in the English sense in Belgium, and in the Belgian sense in England, left a will in the English form disposing of English movables. The court held (1) that he was domiciled in Belgium, (2) that under the circumstances a will made in the English form was valid. Here, at least, the question of the *renvoi* is squarely raised by the facts, since the two

[1] *Buchanan* v. *Rucker*, 9 East 192, 9 R. R. 531; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; cf. *Croudson* v. *Leonard*, 4 Cranch (U. S.) 434; *Overby* v. *Gordon*, 177 U. S. 214.

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countries differ as to the domicil of the deceased. But it is not clear whether the case supports the *renvoi* or not. The result may be explained on the theory of reascertainment of domicil according to Belgian law, and a single reference back to English law as the law by which the validity of the will is to be tested. This is precisely the position advocated by Mr. Westlake. But it is not clear that the court took that view of Belgian law which was, of course, proved as a fact. The conclusion of the court appears to be that while one domiciled in Belgium in the Belgian sense must make his will in the Belgian form, one not so domiciled may make his will in the form authorized by the law of his own country. This does not involve the *renvoi* at all. Any country may divide possible testators into groups, and prescribe a different form of will for each group [1]. And the basis of division into groups may be nationality, religion, race, domicil, or the like. Thus Turkey may authorize Chaldaean Catholics to make their wills in a form different from that prescribed for Mohammedans [2]. An Englishman might equally be permitted to make his will as prescribed by the English Wills Act, while Frenchmen were allowed their own national form. Or a distinctive form might be prescribed for Causasians as distinguished from Malays, Mongolians, or Negroes. Clearly these would be but instances of a highly specialized Wills Act, which is part of the internal, not of the private international law of the country in question. Nor is this altered by making domicil 'in the Turkish sense' the basis of division. Here the second ascertainment of domicil is not the step precedent to ascertaining the 'law of the domicil,' but simply to determining in what class the Turkish Wills Act has placed this particular testator. In other words, we should in such a case ascertain domicil in the English sense to ascertain the 'law of the domicil,' and then after finding that the Turkish Wills Act divided testators into those domiciled, and those not domiciled 'in the Turkish sense' in Turkey, we ascertain domicil in the Turkish sense in order to determine which set of the forms presented is to be applied to this particular will. This, of course, involves neither the national conflict as to domicil, nor the second application of the rules of private international law, which are the two earmarks of the *renvoi*. *Mutatis mutandis* this seems to be the real explanation of *Collier* v. *Rivaz*, and also of *Re Brown-Sequard* (which without any reasoning came to the same conclusion as to a will made in like circumstances in France). And if such be the case they are in truth, not authorities in favour of the *renvoi*, but squarely opposed to it.

Moreover, unless this explanation of *Collier* v. *Rivaz* (1841) is

[1] *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431; Dicey, 678. Cf. Lord Kingsdown's Act, 24 & 25 Vict. c. 114.

[2] *Abd-ul-Messih* v. *Farra*, *supra*.

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correct, that case is overruled by *Bremer* v. *Freeman* (1857) 10 Moo. P. C. 306, Wensleydale. There a will disposing of English movables was made in the *English* form by one domiciled in the English sense in France, but in the French sense in England. *Held*, (1) that the domicil of the deceased was French; (2) that the validity of the will is to be tested by French law; (3) that since the will is not in the French form it is invalid. This case is supplemented by *Hamilton* v. *Dallas* (1875) L. R. 1 Ch. D. 257, Bacon, which held that under similar circumstances as to domicil the English movables of an intestate were distributable according to French law. Here, as in *Collier* v. *Rivaz*, the facts squarely present the question of the *renvoi*, since there is a national conflict as to the domicil of the deceased. Had the full-blown *renvoi* been applied, the validity of that will, or the distribution of those movables, would be a secret to this day. Had even the modified *renvoi* contended for by Mr. Westlake been applied, there would have been a reference back to English law as the final arbiter, which would have led to precisely the opposite conclusion in each case. In both *Collier* v. *Rivaz* was cited. If, therefore, that case, as Mr. Westlake contends, supports the *renvoi*, the question was squarely brought to the notice of the court. But in neither case is there even a hint of reascertaining the domicil with reference to the foreign law, or of a reference back. The court turns directly, and as a matter of course, in the one case to the French law of wills, and in the other to the French Statute of Distributions. Had the *renvoi* been an unquestioned part of English law at that time, it is difficult to believe that it would have been so completely passed over, especially by so learned and eminent a judge as Lord Wensleydale. And even if the seeds of it had been unconsciously planted by the language of earlier cases, these two decisions are, until reversed (and *Bremer* v. *Freeman* was decided by the Judicial Committee of the Privy Council), a complete and permanent blight thereon. They have been, moreover, cited with approval, and followed by the single American case in point (so far as I can discover), *Harral* v. *Harral* (1884) 39 N. J. Eq. 279, which held that where one domiciled in the New Jersey sense in France, but in the French sense in New Jersey, married, the French rule as to community of goods between the spouses will be effectuated by New Jersey as to movables situated therein. In view of these cases, therefore, *Collier* v. *Rivaz* is either opposed to the *renvoi* or else is utterly overthrown.

The last authority cited by Mr. Westlake is a dictum, squarely in favour of the *renvoi*, in *Re Johnson* [1903] 1 Ch. 821. In that case the intestate, whose domicil of origin was Malta, died leaving movables in England, having obtained a domicil of choice, in the

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English sense, in Baden, which Baden would not recognize because she had not obtained the proper authorization. *Held*, that since any prior domicil of choice has been abandoned, and since Baden will not recognize the domicil in the English sense acquired there, the Maltese domicil of origin of the deceased revived and was in force at the time of her death, and hence her movables will be distributed according to Maltese law[1]. Clearly this decision is no example of the *renvoi* since there is no reascertainment of domicil with reference to Baden law. True, Baden law is permitted to negative an undoubted domicil in the English sense, but is itself given no affirmative effect in ascertaining domicil. Instead the domicil of origin is adapted as a compromise. This is doubtless due to the fact that the case was treated as one of new impression. Both counsel and court overlooked the earlier cases, which held that domicil is to be ascertained with reference to the law of the situs only, to which this decision is directly opposed[2]. The dictum above referred to was laid down as one step in reaching this anomalous conclusion as to domicil. These circumstances certainly affect the weight of the dictum as an authority. It is, moreover, squarely in conflict with the decisions in *Bremer* v. *Freeman*, and *Hamilton* v. *Dallas*, *supra*, to say nothing of the American case of *Harral* v. *Harral*, *supra*. A dictum in the Chancery Division can scarcely be held to overrule a decision in that division based on a decision in the Privy Council, and hence those decisions, which are squarely opposed to the *renvoi*, must still represent the present English law.

In summary, therefore, we have the following propositions:—

1. Since the law of the situs is supreme, the law of any other country can have only that effect which the law of the situs may give it.

2. By the great weight of English and American authority, the law of the situs, in disposing of movables, will effectuate the law of the domicil.

3. By the great weight of English and American authority, the domicil of the deceased will be ascertained with reference to the law of the situs, and with reference to that law only.

4. The legal meaning of the phrase, 'law of the domicil,' with reference to the law of the situs is either (*a*) the private international law of the country in question or (*b*) the internal law of such country.

5. If the law of the situs and the foreign law differ as to the

[1] This decision has unfortunately been followed (though without discussion and as the single case in point) in *Re Bowes*, 22 T. L. R. 711 (Ch. D. 1906). There is a dictum to the same effect in *Dupuy* v. *Wurtz*, 53 N. Y. 556, 570.

[2] See p. 5, note 1.

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criteria of domicil, and each effectuates the private international law of the other, there results an endless conflict as to domicil which never arrives at a rule of succession.

6. Mr. Westlake's suggestion that the *renvoi* be stopped after one reference back is open to three objections: (*a*) It makes English law contradict itself; if it be invoked as the *law of situs* it incorporates the private international law of the domicil, if it be invoked as the *law of the domicil* it incorporates the 'internal' law only. (*b*) It involves reopening the question of domicil, which has already been decided by the court of the situs with reference to the law of the situs, and a reversal, by that court, of its prior decision. (*c*) Since the ascertainment of domicil with reference to foreign law would be final (*ex hypothesi*), this is equivalent to ascertaining domicil with reference to the foreign law in the first place, which is contrary to the great weight of authority.

7. The present English law is settled adversely to the *renvoi* by *Bremer* v. *Freeman*, 10 Moo. P. C. 306, decided in the Privy Council in 1857, and followed in *Hamilton* v. *Dallas*, L. R. 1 Ch. 257 in 1875. Unfortunately these cases were overlooked in *Re Johnson* [1903] 1 Ch. 821, and *Re Bowes*, 22 T. L. R. 711 (Ch. D. 1906), which laid down a rule inconsistent therewith. The Privy Council case, however, remains the controlling decision. It is to be hoped, therefore, that when the question next arises, these cases may be noticed and on this point expressly disapproved. The single American case, *Harral* v. *Harral*, 39 N. J. Eq. 279, follows *Bremer* v. *Freeman*. At present, therefore, the *renvoi* cannot be considered a part of the Common Law, either on principle or on authority.

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# CONFLICT OF LAWS AND THE ENFORCEMENT OF THE STATUTORY LIABILITY OF STOCKHOLDERS IN A FOREIGN CORPORATION

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# CONFLICT OF LAWS AND THE ENFORCEMENT OF THE STATUTORY LIABILITY OF STOCKHOLDERS IN A FOREIGN CORPORATION.

IT is well settled that, without any express statutory enactment, one who subscribes to the capital stock of a corporation is liable to it for the par value of the shares for which he subscribes.[1] This obligation has been likened to a trust fund for the benefit of corporate creditors. They may enforce it even after the insolvency of the corporation.[2]

Many States, however, provide by statute for an additional liability on the part of the stockholders to the corporate creditors.[3] A familiar example of such statutory liability is that of stockholders in National Banks. Indeed this has frequently served as a model to the States. As with National Banks the liability is apt to be for a sum not greater than the par value of the stock. As with National Banks also the liability is secondary. The corporation, as such, is primarily liable for its own debts. It is only when the inability of the corporation to meet its debts is sufficiently shown (as by return of execution unsatisfied upon a judgment against the corporation) that the creditors may proceed against the stockholders individually.[4]

Since the liability is imposed by statute, the statute determines its nature and extent. Thus the time when the cause of action accrues,[5] the conditions upon which the liability may be enforced,[6] and the

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[1] Sanger *v.* Upton, 91 U. S. 56; Hawkins *v.* Glenn, 131 U. S. 319; Glenn *v.* Liggett, 135 U. S. 533; Glenn *v.* Marbury, 145 U. S. 499. But a corporation may, if the circumstances require it, *sell* its stock for less than par, and, if the sale be *bona fide*, the purchaser will not be liable for the difference between par and the purchase price. Handley *v.* Stutz, 139 U. S. 417; Clark *v.* Bever, 139 U. S. 96.

[2] See *ante*, note 1.

[3] For a list see Beale, Foreign Corporations, chap. xvii.

[4] Wilson *v.* Seligman, 144 U. S. 41; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640; Middletown Bank *v.* Ry., 197 U. S. 394; Bernheimer *v.* Converse, 206 U. S. 516.

[5] Great Western Tel. Co. *v.* Purdy, 162 U. S. 329; Terry *v.* Anderson, 95 U. S. 628; Carrol *v.* Green, 92 U. S. 509.

[6] Pollard *v.* Bailey, 20 Wall. 520; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747; Middletown Ry. *v.* Bank, 197 U. S. 394.

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persons to enforce it [1] are all determined by the statute as interpreted by the Court of last resort in the enacting State. The same is true as to the persons against whom the liability may be enforced. The statute imposes the liability on "stockholders." The persons who answer this description must obviously be ascertained with reference to the law of the State which created the corporation [2] — assuming, of course, a sufficient assent on their part to become stockholders. In other words substantive matters in respect to this liability must be tested by the law of the State which creates it.

In nature, nevertheless, this liability is a hybrid. It has both contractual and statutory features, and yet it is neither contractual nor statutory. It is incidental to membership in the corporation. It is imposed, irrespective of either knowledge or conscious assent, on all who become stockholders.[3] On the other hand, no person can be made a stockholder without his own consent. No one, therefore, becomes subject to this liability unless he voluntarily becomes a member of the corporation. This assent creates the contractual element of the liability, bringing it within the protection of the constitutional prohibition in regard to impairing the obligation of contracts. The State, therefore, may not increase the liability of existing stockholders.[4] But creditors contract with the corporation in reliance upon this additional security. They, also, may claim the protection of the constitutional provision. The State therefore cannot decrease the liability with respect to existing creditors.[4]

Yet the liability is not contractual. It lacks certain essential elements of contract. The stockholder assents to the statute, it is true, but there the likeness to a contract ends. In the first place the statute is not an offer; it imposes a liability as an incident of membership in the corporation. This burden, moreover, runs with the share of stock as a covenant runs with land. There is, however, no promisee. The stockholder does not contract, in respect of this liability, with the State for the benefit of creditors, with the corporation, or with

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[1] Hale *v.* Allinson, 188 U. S. 56; Finney *v.* Guy, 189 U. S. 335; Jacobson *v.* Allen, 12 Fed. 454; Runner *v.* Dwiggins, 147 Ind. 238.

[2] Penobscot R. R. *v.* Bartlett, 12 Gray (Mass.) 244; Electric Welding Co. *v.* Prince, 195 Mass. 242, 256; Glenn *v.* Liggett, 133 U. S. 533, 538. See Wharton, Conf. of Laws, p. 244.

[3] Howarth *v.* Lombard, 175 Mass. 570, 573–576; Bernheimer *v.* Converse, 206 U. S. 516, 529.

[4] Bernheimer *v.* Converse, 206 U. S. 516, 530.

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the creditors themselves. He is, it is true, secondarily liable, according to the provisions of the statute, for the debts of the corporation. But he is not technically a surety.[1] Thus the corporation and the creditor may, without releasing him, extend by agreement the time for payment of the corporate obligation.[1] There is, in fact, no meeting of minds. The stockholder assents to the statute, either actually or constructively, by becoming a stockholder, and from this union of statute and assent the liability is born. This double nature of the liability has important effects when suit is brought on it in another State.

While the law of the creating State determines the extent of the liability, the law of the forum determines the extent of the remedy to be given in a suit thereon. Thus the law of the creating State determines when the cause of action accrues,[2] but the statute of limitations of the forum determines whether the action is barred.[3] The creating statute prescribes the conditions of enforcement;[4] the law of the forum determines whether the liability is enforceable.[5] The law of the creating State determines whether an exclusive statutory remedy has been coupled with the right;[6] the law of the forum determines whether that remedy can be given in the State in which action is brought.[7] The law of the creating State determines who is the proper party plaintiff;[8] the law of the forum determines whether the plaintiff is the proper party.[9] In a word the creating law determines what the liability is; the law of the forum determines what effect, if any, is to be given thereto.

A collateral question, which often arises in regard to enforcing the superadded liability in other States, well illustrates both branches of this rule. It frequently happens that such suits are brought by a receiver appointed in the State which created the liability. It is a

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[1] Boice *v.* Hodge, 51 Oh. St. 236.

[2] See *ante*, note 5, p. 37.

[3] Great Western Tel. Co. *v.* Purdy, 162 U. S. 329; Platt *v.* Wilmot, 193 U. S. 602.

[4] See *ante*, note 6, p. 37.

[5] Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184; May *v.* Black, 77 Wis. 101; Finney *v.* Guy, 106 Wis. 256.

[6] Pollard *v.* Bailey, 20 Wall. 520.

[7] Fourth National Bank *v.* Francklyn, 120 U. S. 747; Middletown Bank *v.* Ry., 197 U. S. 394; Erickson *v.* Nesmith, 4 Allen (Mass.) 233; Clark *v.* Knowles, 187 Mass. 35.

[8] See *ante*, note 1, p. 38.

[9] Hale *v.* Allinson, 188 U. S. 56; Finney *v.* Guy, 189 U. S. 335; Bernheimer *v.* Converse, 206 U. S. 516.

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familiar rule that a Chancery receiver may not sue outside the State in which he is appointed.[1] The reason is plain. A Chancery receiver is merely the arm of the court of equity which appoints him. That court draws its powers from the State which establishes it. It has no power to act outside that State.[2] Clearly it cannot delegate powers which it does not itself possess. A Chancery receiver, therefore, cannot *of right* sue in another State. It is true that a few federal cases have permitted such a receiver to sue on the ground of comity,[3] but this position has since been repudiated by the Supreme Court.[4] On the other hand, a receiver who is clothed with the legal interest in a cause of action may sue in other States.[5] In such a case he sues, not as receiver, but as title holder. His receivership is the means by which he is clothed with the title, but it clothes him with no extraterritorial power, save that which springs from such title. Suit by a receiver, therefore, illustrates both branches of the rule. The extent of his interest is determined by the law of the State of appointment;[6] the question whether that interest is sufficient to sustain suit by him in another State is governed by the law of the forum.[7]

It now becomes necessary to consider certain characteristics of the three general systems of statutory liability, in order to determine how far each system is enforceable outside the State of creation. These systems differ mainly in the nature of the *remedy* provided by the creating State. *Substantively* all are similar in that each is secondary and may not be resorted to until the inability of the corporation to meet its debts is sufficiently established. But, as will be shown, the nature and extent of the remedy conferred by the enacting State may limit enforcement of this statutory right in other States. These three

[1] Booth *v.* Clark, 17 How. (U. S.) 322.

[2] Thus a court of equity, even though it has personal jurisdiction of the defendant, will seldom, if ever, order him to take affirmative action in another State. Carteret *v.* Petty, 2 Swanst. 323; Watkins *v.* Holman, 16 Pet. (U. S.) 25.

[3] Hale *v.* Hardon, 95 Fed. 747; Hale *v.* Tyler, 104 Fed. 757; Hale *v.* Hilliker, 109 Fed. 273.

[4] Hale *v.* Allinson, 188 U. S. 56; Finney *v.* Guy, 189 U. S. 335; Great Western Mining Co. *v.* Harris, 198 U. S. 561.

[5] Relfe *v.* Rundle, 103 U. S. 222; Howarth *v.* Lombard, 175 Mass. 570; Bernheimer *v.* Converse, 206 U. S. 516. The same is true of an assignee. Hawkins *v.* Glenn, 131 U. S. 319; Glenn *v.* Liggett, 135 U. S. 533.

[6] Hale *v.* Allinson, 188 U. S. 56; Bernheimer *v.* Converse, 206 U. S. 516.

[7] See cases cited *ante*, note 6. The test laid down by a recent decision is: Has the receiver such an interest as will support suit in the State of appointment? Hale *v.* Allinson, *supra*.

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systems, therefore, will be classified according to the remedy coupled thereto by the enacting State.

The crudest system permitted any creditor to proceed against any stockholder at common law, after recovering a judgment against the corporation upon which execution had been returned unsatisfied.[1] This worked unsatisfactorily. It apportioned the burden unequally between large and small stockholders. The large stockholders were sued, because enough could be recovered from them to make the litigation pay, while for the opposite reason the small stockholders were often not sued at all. The creditor, in a word, could thus select, according to caprice or whim, the person or persons who must bear this corporate burden. On the other hand, while this liability was held to be enforceable in some States,[2] the courts in other States declined to enforce it for reasons of public policy.[3] It was urged against enforcement that the liability was statutory; that the creating statute was without force outside the enacting State, and that, therefore, no action could be brought thereon outside the State which created the right. But to this argument it was replied that, when the cause of action had accrued, the creditor could sue at law as if for a breach of contract. This view and the consentual elements of the liability led the United States Supreme Court to hold the statutory right enforceable outside the State of creation.[4]

The next system effected a more equitable distribution of the burden, although it did not do complete justice. The element of caprice was eliminated by defining a special statutory remedy. As in the system just discussed, the inability of the corporation to meet its debts had first to be established, but, this condition precedent having been performed, the statutory remedy resembled a gigantic bill of peace. All the creditors were allowed to file a bill in equity, within a certain time, against the corporation, and all the alleged stockholders who could be reached within the jurisdiction.[5] In this action the various conflicting rights and equities were adjusted. In the first place, the

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[1] Wilson *v.* Seligman, 144 U. S. 41 (Mo.); Whitman *v.* Oxford Nat. Bank, 176 U. S. 559 (Kan.).

[2] Whitman *v.* Oxford Nat. Bank, 176 U. S. 559.

[3] See *ante*, note 5, p. 39.

[4] Whitman *v.* Oxford Nat. Bank, 176 U. S. 559; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640.

[5] Middletown Bank *v.* Ry., 197 U. S. 394 (Ohio); Hale *v.* Allinson, 188 U. S. 56 (Minn.).

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assets of the corporation were applied on its indebtedness. Then the question whether each individual defendant was a stockholder, and, if so, to what extent, was determined as against him. Thereafter the unpaid balance of the corporate indebtedness was ascertained, and apportioned among the various defendant stockholders, in proportion to their holdings. If any stockholder was insolvent and unable to meet his proportion, his transferors were called in to meet those corporate debts which existed or were contracted at the time the transferor was a stockholder.[1] The final result was a crop of personal judgments which were collected for division among the corporate creditors.

Nevertheless this method of enforcing the liability had a serious defect. The statutory remedy in equity was held to be exclusive.[2] In the State of creation no other was applicable. But stockholders in other States were, as a matter of common justice, entitled to similar protection. To permit the creditor to sue foreign stockholders at law subjected them to a heavier burden than rested upon domestic stockholders. The remedy therefore was held to be coupled to the right both at home and abroad.[3] But the statute defining the remedy was not in force outside the enacting State. That remedy, therefore, could not be given outside the State of creation. Moreover, since the remedy was exclusive, no other could be given. The result was that the right could not be enforced outside the State of creation.[3] Under this system, therefore, the whole burden was cast on domestic stockholders.

Thus in avoiding one difficulty this second form of remedy fell into another. The first system was enforceable both within and without the enacting State. But both within and without the enacting State the stockholders were subject to the creditor's caprice. He selected at will the persons to bear the corporate burden. This second system divided the burden proportionally among all domestic stockholders alike. All who could be found were necessary parties to the bill of peace. The caprice of the creditor was therefore eliminated. But in reaching this result mobility was sacrificed. The right ceased to be enforceable outside the State of creation. The problem, therefore,

[1] As an example see Brown *v.* Hitchcock, 36 Oh. St. 667; Wheeler *v.* Faurot, 37 Oh. St. 26; Harpold *v.* Strobart, 46 Oh. St. 397; Poston *v.* Hull, 75 Oh. St. 502.

[2] Pollard *v.* Bailey, 20 Wall. 520.

[3] Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747; Middletown Bank *v.* Ry., 197 U. S. 394; Erickson *v.* Nesmith, 4 Allen (Mass.) 233; Clark *v.* Knowles, 187 Mass. 35.

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was to provide a remedy which would be enforceable both within and without the State, and which would still apportion the burden fairly.

To meet this need the assessment system was evolved, following the model provided by the National Banking Act.[1] By the assessment system the equitable action of the second system above described is split into two parts, one in equity against the corporation, the other at law against the stockholders individually. As in the two systems already discussed, the inability of the corporation to meet its debts must be shown as a condition precedent to this relief; for instance, by return of "no goods" upon an execution issued on a judgment against the corporation. Thereafter action is brought against the *corporation* to obtain a receiver. In this action the excess of corporate debts over corporate assets is established and the amount of capital stock outstanding is determined. It then becomes a matter of simple arithmetic to ascertain what must be collected from the holder of each share of stock.

A concrete example will make this clear. Suppose that in this action against the *corporation*, the corporate debts are found to be one million; the corporate assets, five hundred thousand; and the capital stock issued, one million. The difference between the debts and the assets is five hundred thousand dollars of debt. This is precisely one-half the outstanding capital stock. The assessment therefore is fifty per cent, or fifty dollars on each share of one hundred dollars, by whomsoever such share may be held.

But this assessment proceeding is directed against the corporation alone. Jurisdiction of the corporation is sufficient to sustain it.[2] Indeed a recent case has held that no notice need be given to the stockholders.[3] This is entirely logical. The stockholders are not personally before the court. No personal judgment is rendered against them.[4] Indeed no person is adjudged to be a stockholder,[4] though the total amount of stock outstanding is ascertained as one of the corporate liabilities. Other personal defences are left open. For example, one

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[1] For examples under the National Banking Act, see Kennedy *v.* Gibson, 8 Wall. 498; Casey *v.* Galli, 94 U. S. 673.

[2] Bernheimer *v.* Converse, 206 U. S. 516; Howarth *v.* Lombard, 175 Mass. 570. See also Hawkins *v.* Glenn, 131 U. S. 319.

[3] Goss *v.* Carter, 156 Fed. 746.

[4] Bernheimer *v.* Converse, 206 U. S. 516, 532; Howarth *v.* Lombard, 175 Mass. 570, 579.

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sued on the assessment may set up that section of the statute of limitations of the forum, which is applicable to ordinary actions of contract.[1] In other words the burden which each share of stock must bear is ascertained, though the persons who must bear that burden are not determined. In this way equality of burden is obtained without violating any personal right. The question of personal liability is left to be settled in the separate actions at law against the individuals alleged to be stockholders.

Yet the assessment proceeding is a judicial proceeding. The necessity for and the extent of the assessment are *res adjudicatae* against the corporation. The assessment binds, in their *corporate*, though not their *personal* capacity, all persons who are in truth stockholders. This result follows from the nature of a corporation. The law has conferred on the associates a common legal entity. They may sue and be sued, in respect of *corporate* matters, in the corporate name. Just as the stockholders need not join in an action by the corporation, so they need not be joined in an action against the corporation. They are to this extent represented by the corporate entity. Thus a valid judgment against the corporation forecloses, as against stockholders, everything which is properly adjudged against the corporation. It follows that the judgment against the corporation is not open to collateral attack by a stockholder upon the ground that he was not joined in the action.[2]

A further proceeding is therefore necessary to render the assessment effective as a personal liability. The assessment fixes the *rate* of liability, but the *persons* who are liable have yet to be judicially ascertained. This is done in single actions at law brought against each alleged stockholder respectively. In each of these actions the plaintiff must establish that the defendant is in truth a stockholder, and show the number of shares held by him. The defendant, as has been shown, may bring forward any personal defence, though he may not attack either the necessity for or the extent of the assessment. In other words the assessment represents the measure of damages which will be applied if personal liability as a stockholder is established.

The assessment method therefore combines the advantages of both the former systems. By the assessment proceeding proper, a uniform

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[1] Ramsden *v.* Knowles, 151 Fed. 718, affirmed in 151 Fed. 721; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329.

[2] Howarth *v.* Lombard, 175 Mass. 570; Bernheimer *v.* Converse, 206 U. S. 516.

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rate of burden per share is established for all stockholders, large and small. This proceeding is necessarily local and can be enforced only where personal jurisdiction of the corporation may be had. But such jurisdiction may always be obtained in the State where the corporation is created. This local feature therefore presents no difficulty. On the other hand, the personal liability of each individual is fixed in a subsequent action at law. This so far resembles a common law action that it may be brought outside the State which creates the liability, though the right is partly of statutory origin.[1] The local nature of the "bill of peace" method is thus confined to the assessment proceeding proper, and no longer prevents enforcement of the liability outside the State of creation. The assessment method, therefore, combines proportionate uniformity of burden with general enforceability against all who ought to bear the burden.

The three systems, therefore, may be recognized by their fruits. In the first, a crop of single actions at law sprang up as soon as the inability of the corporation to meet its debts was properly shown. In the "bill of peace" system a single action in equity, to which corporation, creditors, and stockholders were all parties, replaced the group of actions at law in system one. In this single action in equity *personal judgments* were rendered against all persons who were made parties and adjudged to be stockholders. This sharply differentiates it from the assessment proceeding proper in which the rate of liability is determined, but the persons to be held liable are not ascertained. The assessment method, therefore, differs from system one in that the ascertainment of this rate of liability is the condition precedent to the accrual of the separate personal rights of action against the stockholders. It differs from the "bill of peace" system in that a judgment against the defendant in the separate personal action at law is the condition precedent to personal liability. The first and third systems, therefore, are enforceable outside the State imposing the liability, the second is not.

In this connection, however, an important distinction must be noted. The nature of the remedy may clog enforcement of the liability without contractually limiting the right. This point was directly presented and decided in Bernheimer *v.* Converse, 206 U. S. 516. In that case certain non-residents had become stockholders in a Minnesota corporation at a time when the statute made an equitable action similar

[1] Bernheimer *v.* Converse, 206 U. S. 516; Howarth *v.* Lombard, 175 Mass. 570.

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to a bill of peace, the proper method of enforcing the stockholders' liability. Subsequently the legislature repealed this remedy and substituted the assessment method in its place. A remedy enforceable against these non-residents was thus substituted for one which was unenforceable against them. The corporation was wound up; the amount of assessment determined; and the defendants were sued under the new statute. They contended that the statute was unconstitutional in that it enlarged their liability. The Supreme Court rejected this view and held that the extent of the liability was not diminished by imposing a remedy which confined enforcement to the State of creation; that the legislature might properly substitute an effectual for an ineffectual remedy, and that therefore the statute was not invalid as impairing the obligation of the stockholders' contracts. This case emphasizes the distinction between the "assessment" and the "bill of peace" methods of enforcement. It also shows that, where the remedy alone shackles the right to the State of creation, the legislature may strike off the clog and make the liability enforceable, both within and without the State.

Thus far, so far as the writer knows, there has been no attempt in this country to devise a single proceeding which will foreclose the personal defences of absentees. As has been shown, the "bill of peace" method results in personal judgments only against those who were personally before the court, while the assessment method does not determine any individual liability in the assessment proceeding. It has been long established that service by publication will not give personal jurisdiction.[1] On the other hand, personal jurisdiction may be conferred by consent. Thus voluntary appearance before the court, either as plaintiff,[2] or as defendant,[3] will confer jurisdiction without personal service. Agreement between the parties may confer personal jurisdiction.[4] Thus a foreign corporation may consent to be sued within the State as the price of permission to do business therein.[5] Moreover, if a statute exacts such consent as a condition precedent to doing business, doing business in the State will amount to consent.[5] A stockholder in a foreign corporation may in like manner consent to

[1] Pennoyer *v.* Neff, 95 U. S. 714; Wilson *v.* Seligman, 144 U. S. 41. See also Hale *v.* Allinson, 188 U. S. 56.

[2] Ricardo *v.* Garcias, 12 Cl. & Fin. 367; Fitzsimmons *v.* Johnson, 90 Tenn. 416.

[3] Voinet *v.* Barrett, 55 L. J. Q. B. 39; Hilton *v.* Guyot, 159 U. S. 113.

[4] Feyericks *v.* Hubbard, 18 T. L. R. 381; Dicey, Conf. of Laws, 1 ed., 369.

[5] St. Clair *v.* Cox, 106 U. S. 350.

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be sued in respect of corporate matters in the courts of the State which creates the corporation.[1] Thus, if, in accordance with French law, the stockholder designates some French person on whom service may be made, such service is sufficient.[2] And where such consent is expressly made a condition of membership in the corporation, one who takes stock therein will be held to have assented, even though he was ignorant of the provision.[3] And if a statute designates the chairman of a joint stock company as the representative of its members for purposes of suit, a judgment obtained against such chairman binds all the members of the company personally, even though they, or any of them, were ignorant of the statute at the time of joining the company, and were not personally served in the action.[4] It seems, therefore, and these authorities are all that the writer has been able to find, that if a stockholder assent to be sued, without personal service, in the courts of the State which creates the corporation, such assent will confer personal jurisdiction.

On the other hand, such assent is not lightly to be inferred.[5] In every one of the stockholder cases cited above there was some *express* provision of the statute enacting such assent as an incident of membership in the corporation. Nothing less should suffice. Even the *express* provision in respect of the superadded liability imposes great hardships. Corporate stock is sold far and wide. The statutes of the State which creates the corporation are seldom accessible to the purchaser. Frequently even skilled legal examination is not sufficient to unravel all their meaning. But the *express* provision in respect of liability at least gives notice that *some* liability is assumed even though its nature and extent may not be plain. Nothing less should deprive a man of his ordinary right to personal service. To render service by publication sufficient the statutory provision should be prominent and explicit. Indeed common fairness would dictate placing both this and the liability provision upon the certificate. Perhaps

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[1] Copin *v.* Adamson, L. R. 9 Exch. 345.

[2] Vallée *v.* Dumergue, 4 Exch. 290.

[3] Copin *v.* Adamson, L. R. 9 Exch. 345, but see dissenting opinion by Kelly, C. B. The decision was affirmed in 1 Ex. D. 17.

[4] Bank of Australasia *v.* Nias, 16 Q. B. 717; Kelsall *v.* Marshall, 1 C. B. N. S. 241; Bank of Australasia *v.* Harding, 9 C. B. 661; and see generally 20 HARV. L. REV. 323.

[5] Emanuel *v.* Symon, L. R. 1908, 1 K. B. 302; reversing Emanuel *v.* Symon, L. R. 1907, 1 K. B. 235. See also Hall *v.* Lanning, 91 U. S. 160; D'Arcy *v.* Ketchum, 11 How. 165.

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this feeling leads to the singular dearth of authority in this country. The writer has discovered no American case which directly passes on this question of assent to jurisdiction by a stockholder. It seems to be assumed as a matter of course that a mere provision for service upon non-resident stockholders by publication, without more, will not draw after it an assent that such service shall be sufficient.[1] While, therefore, there is little direct authority, it seems that neither membership in the corporation nor a statutory provision for service by publication, without more, will confer personal jurisdiction of non-resident stockholders. Some more explicit requirement in respect of such assent seems necessary even to raise the question.

It may be indeed that to require non-residents, as distinguished from residents, to assent to such service would be unconstitutional. This in the last analysis would depend on the question whether the right to hold stock in a domestic corporation upon the same terms as domestic stockholders is a privilege or immunity of citizens of the several States. The question is remote at present and has no place in this article. But it may become serious in the future.

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[1] Wilson *v.* Seligman, 144 U. S. 41; Hale *v.* Allinson, 188 U. S. 56, 80.

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# MISTAKE OF FACT AS A GROUND FOR AFFIRMATIVE EQUITABLE RELIEF

BY

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# MISTAKE OF FACT AS A GROUND FOR AFFIRMATIVE EQUITABLE RELIEF.

EQUITY, in a proper case, will relieve from mistake. Mistake may be a ground for affirmative relief.[1] It may be a defense to specific performance.[2] As a ground for affirmative relief, mistake is often placed in the same category with accident and fraud. All three have the common characteristic that each, when established in the legal sense, creates an inequality between the parties which will move the discretion of the Chancellor to action. Moreover, there is no bright line which divides mistake from either fraud or accident. Yet mistake is distinguishable from both. Accident creates a change in the actual situation of the parties — as destruction of the subject matter of a bargain by the act of God. It contains no mental element. Mistake, on the other hand, leaves the actual facts untouched. It involves affirmative action by the human mind. It consists in forming an incorrect mental picture of the situation. If this incorrect mental picture is caused by the unlawful representations or unlawful silence of another human being, the case passes from the realm of mistake into the realm of fraud. The presence of the mental ingredient, then, is the striking difference between accident and mistake. Fraud, on the other hand, consists of mistake plus a further element, the unlawful causing of the error by some person different from the person who labors under the mistake. Broadly speaking, then, if the error is the work of the party who labors thereunder the case is one of mistake. But, if the incorrect mental picture be due to the unlawful silence or the unlawful representations of some third party, this further element of third party causation makes the case one of fraud. For this reason equity is slower to relieve from mistake than from fraud. The fact that the party who sets up the mistake is the party responsible therefor makes it necessary for him to show special and peculiar grounds for relief.

Mistake of law is to be distinguished from mistake of fact. A mistake of law arises when a party is accurately informed, either

[1] 16 Cyc. 68, note 1.

[2] See Fry, Specific Performance, 4 ed., p. 329, and p. 522 *et seq.*

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actually or constructively, of the facts, but reaches an erroneous conclusion with respect to the legal rights growing out of those facts. A mistake of fact arises when a party forms a conception of the facts which differs from the facts as they really exist. The principle is clear enough, but the application to given cases is a matter of great nicety which is beyond the scope of this article. Here it is enough to say that, while the general rule is that equity will not relieve from a mistake of law,[1] such relief has been given,[2] and some courts have been very ingenious in discovering exceptions to the rule itself.[3]

Mistake of fact, then, is a ground for affirmative equitable relief.[4] But equity will not relieve from every species of mistake of fact. The mistake must be appropriate to the relief sought, and must bear the right relation to the parties and to the subject matter. Mistake of fact, must, therefore, be classified with respect to the relief at the Chancellor's disposal, with respect to the parties, and with respect to the subject matter.

Naturally, the relief, if relief be given, must reach the mistake. But the rule works both ways. Where particular relief is sought, the mistake must justify that relief.[5] Analysis of the relief which may be given is, therefore, a partial analysis of the kind of mistake which is ground for relief. Broadly speaking, the Chancellor has at command two kinds of affirmative relief. He may rescind the bargain or transaction, or he may reform the writing in which the bargain or transaction is intended to be expressed, provided that there is such a writing. The word "rescind" is here used in the broad sense, and includes cancellation and surrender up.[6] The statement of the two broad species of relief brings out one striking and basic difference between them. Rescission deals with the subject matter of the bargain or transaction: reformation deals with writings only. But a bargain is born of a meeting of minds upon the subject matter thereof. To be ground for rescission, the mistake must touch the subject matter of the bargain.[7] If it be collateral to the bargain, no rescission can be given.[8] On the other hand, reformation leaves the bargain un-

[1] 16 Cyc. p. 73, note 36.

[2] Griswold *v.* Hazard, 141 U. S. 260. See 16 Cyc. p. 73, note 37.

[3] 16 Cyc. p. 74.

[4] 16 Cyc. p. 68, note 1.

[5] Truesdell *v.* Sarles, 104 N. Y. 164.

[6] 6 Cyc. p. 285.

[7] Hurd *v.* Hall, 12 Wis. 112; Strickland *v.* Turner, 7 Exch. 208.

[8] Hecht *v.* Batcheller, 147 Mass. 335; McCobb *v.* Richardson, 24 Me. 82; Wood *v.* Boynton, 64 Wis. 265; Stewart *v.* National Bank, 104 Me. 578.



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touched. To be ground for reformation, the mistake must intervene between the creation of the bargain and the reduction of it to writing, and must touch the writing only.[1] If the writing be exactly what the parties intended, there can be no reformation.[2] It follows, then, that one who seeks rescission must establish a mistake of the proper character which touches that on which the minds of the parties met; if he seeks reformation, he must establish a mistake in respect of the writing only.

Another principle in regard to reformation brings out this distinction very clearly. To obtain reformation, the plaintiff must establish some standard to which the writing may be reformed. But, when the writing is intended to express a transaction founded on valuable consideration, nothing less than a valid and enforceable bargain will serve as a standard.[3] Equity cannot make a contract for the parties. True, the Chancellor may cast into prison the body of one in contempt. Once he was supposed to have power to damn the soul of a disobedient defendant. But he never has claimed jurisdiction over the human mind. A valid bargain is born of a meeting of minds. If the minds of the parties never met, there is no bargain to which the writing can be reformed.[4] Reformation, then, is an affirmance of the bargain as it was actually made.[5] Rescission, on the other hand, is a disaffirmance of the bargain itself. It is the antithesis of reformation. Consequently, a mistake which is ground for reformation will not justify rescission in any ordinary case; while a mistake which is ground for rescission will not justify reformation, since it strikes at the bargain which must serve as the standard for reformation.[6]

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[1] Page *v.* Higgins, 150 Mass. 27; Ledyard *v.* Hartford Ins. Co., 24 Wis. 496.

[2] Andrew *v.* Spurr, 8 Allen (Mass.) 412; Whittemore *v.* Farrington, 76 N. Y. 452; Braun *v.* Wis. Rendering Co., 92 Wis. 245; Auer *v.* Mathews, 129 Wis. 143.

[3] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Petesch *v.* Hambach, 48 Wis. 443; Moehlenpah *v.* Mayhew, 138 Wis. 561; Glass *v.* Hulbert, 102 Mass. 24; Peirce *v.* Colcord, 113 Mass. 372; United States *v.* Milliken Co., 202 U. S. 168; Fulton *v.* Colwell, 112 Fed. 831.

[4] Page *v.* Higgins, 150 Mass. 27; Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Ledyard *v.* Hartford Ins. Co., 24 Wis. 496. *Cf.* Raffles *v.* Wichelhaus, 2 Hurl. & Colt. 906; Ionides *v.* Pacific, etc. Ins. Co., L. R. 6 Q. B. 674; Hickman *v.* Bereus, 1895, 2 Ch. 638.

[5] Pfeiffer *v.* Marshall, 136 Wis. 51. But some courts permit a bill which seeks reformation, or, in the alternative, cancellation. Gun *v.* McCarthy, L. R. Ir., 13 Ch. D. 304. Though it has been held improper to reform an absolute deed into a mortgage, where the relief sought by the bill was rescission. Truesdell *v.* Sarles, 104 N. Y. 164.

[6] Laver *v.* Dennett, 109 U. S. 90; R. R. Co. *v.* Steinfeldt, 42 Oh. St. 449; Trues-

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Mistake, when classified with respect to the parties thereto, is either unilateral or mutual. A unilateral error is confined to one party only. A mutual mistake is a mistake common to both parties. But two different mistakes with respect to the same bargain do not make a mutual mistake. The same error must be shared by both parties in order to render the error mutual. In this respect mutual error resembles mutual assent. Unless the minds of the parties meet on the subject matter of the bargain, there is no mutual assent thereto.[1] Unless the minds of the parties fall into the same misconception with respect to that bargain, there is no mutual error.[1] At best, there is simply a pair of unilateral mistakes.[1]

Perhaps two illustrative cases will make this point clear. In Page *v.* Higgins,[2] the plaintiff agreed to buy of the defendant "all the land owned by the defendant east of the stone wall." The plaintiff understood this to include the Cheever lot, the defendant understood this to omit the Cheever lot, which he did not own. The plaintiff drew the deed, describing the land conveyed by metes and bounds, and in good faith included the Cheever lot therein. The defendant failed to discover that the Cheever lot was included. This action was brought on the covenant of seisin in the deed. The defendant (by statute) set up what in effect amounted to a claim for reformation. *Held*, that a judgment for defendant must be reversed, since the evidence shows two different mistakes, and not a common or mutual mistake — the error of the plaintiff being as to the meaning of the original agreement, the error of the defendant being as to the contents of the deed. In Ledyard *v.* Hartford, etc. Ins. Co.[3] the plaintiff requested insurance upon certain furniture in building number 1; the insurance agent understood that the furniture was in building number 2, and so drew the policy. Building number 1 burned with the furniture. Plaintiff seeks reformation of the policy, so that it should describe the furniture as in building number 1. *Held*, that, since the evidence shows two unilateral mistakes as to the bargain, and no

dell *v.* Sarles, 104 N. Y. 164. But see Abbott *v.* Dow, 133 Wis. 533. Here the minds of the parties met on an agreement to purchase lot 1; by mutual mistake, the writing described lot 2. Before the mistake was discovered, the defendant conveyed lot 1 to a purchaser for value and without notice. On discovery of the mistake, the plaintiff sought rescission and recovery of moneys already paid down. *Held*, that, while the usual relief would be reformation, rescission will be here granted in view of the inability of the defendant to perform the original agreement because of his innocent conveyance of lot 1.

[1] See *supra*, note 4. [2] 150 Mass. 27. [3] 24 Wis. 496.

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mutual mistake as to the writing, reformation cannot be given. These cases, then, show that, where each party labors under a different mistake, the two different mistakes cannot be combined to make a mutual or common mistake.

A mistake by one party, coupled with ignorance thereof by the other party, does not constitute a mutual mistake.[1] Thus, if the minds of the parties meet on the subject matter of the bargain, but one party enters into the bargain under a mistake, and the other party enters into the bargain in ignorance of the mistake, or in the belief that no mistake has been made, there is no mutual error. Two recent cases illustrate this very nicely. In Steinmeyer *v.* Schroeppel,[2] the defendant requested a bid from the plaintiff upon certain items of lumber. The plaintiff's clerk set down these items on a piece of paper, with the price of each item marked against it. The plaintiff's partner added the items incorrectly. The plaintiff adopted the erroneous total and made a written offer to supply the lumber for that sum, which was some four hundred dollars short of the correct total. This offer the defendant accepted in good faith. On discovery of the mistake, the plaintiff brought a bill in equity to rescind the contract. The court below granted this relief. The Supreme Court of Illinois reversed the judgment upon the ground that the mistake was not mutual. Another case, very like the last, is Grant Marble Co. *v.* Abbot.[3] In this case, the plaintiff made a written offer to install marble in all six stories of the defendant's building for $24,150. In making this offer, the president of the plaintiff company used certain figures furnished by a subordinate, supposing that they covered the work in all six stories. In truth, they only covered five stories. The defendant accepted the offer in ignorance of the mistake. On discovery of the mistake, the plaintiff sought relief in equity, and the court below rescinded the bargain. The Supreme Court of Wisconsin held that the mistake was not mutual and reversed the judg-

[1] Moffett, etc. Co. *v.* Rochester, 91 Fed. 28 (reversed on another ground in 178 U. S. 373); Dewey *v.* Whitney, 93 Fed. 533; Comer *v.* Granniss, 75 Ga. 277; Griffin *v.* O'Neil, 48 Kan. 117; Steinmeyer *v.* Schroeppel, 226 Ill. 9; McCormack *v.* Lynch, 69 Mo. App. 524; Benn *v.* Pritchett, 163 Mo. 560; Wilson *v.* Western Land Co., 77 N. C. 445; Brown *v.* Levy, 29 Tex. Civ. App. 389; Coates *v.* Buck, 93 Wis. 128; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis., 1910). Another familiar instance of the same principle is the case where a surety is induced to make the contract by the fraud of the principal debtor, but the fraud is unknown to the creditor. See *post*, p. 624, note 3.

[2] 226 Ill. 9.

[3] 124 N. W. 264 (Wis., 1910).

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ment. These cases, then, emphasize the principle that a mistake is not mutual, unless both parties labor under the same misconception. A mistake by one party, and a belief by the other party, that there has been no mistake, make a pair of different mistakes and not a mutual error.

A mistake, when classified with respect to the subject matter of the contract, is either intrinsic or extrinsic. An intrinsic mistake is defined by Mr. Justice McLean in Allen *v.* Hammond [1] as a "material mistake as to the subject matter of the bargain." Story, J., in Hammond *v.* Allen [2] (the same case in the court below) defines it as "a mistake of fact going to the essence of the contract." In Kowalke *v.* The Milwaukee, etc. Co.,[3] Mr. Justice Dodge says that an intrinsic mistake is a mistake as to "one of the things actually contracted about." An intrinsic mistake, then, is an error with respect to some matter which the parties have made a condition of the bargain. But this does not mean that the condition must of necessity be expressed in words. The acts of the parties and the expressed terms of the bargain may define the condition with sufficient clearness to render an error with regard to it intrinsic. The stock judicial example of such a clearly defined, but seldom expressed, condition is the assumption, by the parties, of the continued existence of the subject matter of the contract. When A and B agree upon the sale of a given horse, they seldom, if ever, say in words: "If this horse is dead, the bargain is off." Yet this is as clearly understood as if expressed. The making of the agreement is, in effect, a statement of this condition. If, at the time the parties made the bargain, the horse was dead, we have a clear example of an intrinsic error.

An extrinsic error, on the other hand, is an error in respect of some matter collateral to the bargain. It may affect the reasons for entering into the contract, or touch some matter of inducement, but it leaves untouched the subject matter or essence of the agreement itself. Thus mistakes as to value or quality are classed as extrinsic mistakes, because they touch neither the existence nor identity of the thing sold, nor the basis of the bargain. Frequently, the parties, if they knew the truth, would not make the agreement which they did make. But this is not the test. The test seems to be, does the mistake affect the basis or understanding on which the parties contracted?

[1] 11 Pet. (U. S.) 63, 70.
[2] 2 Sumn. (U. S.) 387, 395.
[3] 103 Wis. 472, 477.

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If it does, the mistake is intrinsic; if it does not, the mistake is extrinsic. Of course the distinction between intrinsic and extrinsic mistakes is one of great nicety. But it is essentially a question of fact under all the circumstances of the case. It is not surprising, therefore, that, in particular instances, we may find cases on quite similar facts, which have been decided in opposite ways. As we shall see later, an intrinsic mistake is ground for equitable relief,[1] while an extrinsic mistake is not.[2] The burden of showing that the mistake is intrinsic is upon the party who sets it up. He may succeed in one case and not in the other. Perhaps this goes far to explain the somewhat contradictory decisions on the subject.

Certain classes of mistake are clearly intrinsic. A mistake in regard to the identity of the thing contracted for is obviously of the essence. Thus, in Raffles *v.* Wichelhaus,[3] the plaintiff and defendant agreed that the defendant should buy at a certain price one hundred and twenty-five bales of Surat cotton "ex Peerless" from Bombay. There were two ships called the Peerless which sailed from Bombay, and it subsequently appeared that the plaintiff meant the one and the defendant the other. *Held*, an intrinsic mistake which prevented the formation of any contract. It may be noted that the error in Page *v.* Higgins, *supra*, and Ledyard *v.* Hartford Ins. Co., *supra*, was of similar nature. The parties were not at one as to the subject matter of the bargain. In the same way, if the parties to a sale are not at one as to the identity of the vendee, there is an intrinsic mistake which goes to the validity of the sale.[4] Thus, in Rodliff *v.* Dallinger,[5] one who represented himself as the agent of an undisclosed principal induced the plaintiff to deliver to him goods with intent to pass title thereto to the principal. There was in truth no principal. *Held*, that no title passed. A mistake, then, as to the identity of the subject matter or as to the identity of the parties (if that identity be material) [6] is clearly intrinsic. Also it is usually fatal to the legal validity of the transaction.

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[1] See *post*, p. 615, notes 2–5 inclusive. [2] See *post*, p. 616, notes 1–5 *et seq.*

[3] 2 Hurl. & Colt. 906.

[4] Cundy *v.* Lindsay, 3 A. C. 459; Boulton *v.* Jones, 2 H. & N. 564. Boston Ice Co. *v.* Potter, 123 Mass. 28.

[5] 141 Mass. 1; Smith Co. *v.* Stidger, 18 Col. App. 261; Rogers *v.* Dutton, 182 Mass. 187; Hamet *v.* Letcher, 37 Oh. St. 356, *acc.* But a party may be estopped to set up his error. Stoddard *v.* Ham, 129 Mass. 383; Dowagiac Mfg. Co. *v.* Schroeder, 108 Wis. 109; Bostwick *v.* Mutual Life Ins. Co., 116 Wis. 392.

[6] See Smith *v.* Wheatcroft, L. R. 9 Ch. D. 223, 230.

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While an intrinsic mistake may prevent the formation of the bargain, it need not necessarily do so. The parties may come together both upon the subject matter and the terms of the contract, and yet labor under a mistake which touches the essence. Thus the existence of the subject matter of the agreement is a clearly understood but seldom expressed condition of the transaction.[1] Where the parties bought and sold a cargo at sea, in ignorance of its loss, the error was held to be of the essence and ground for relief.[2] In the same way, if an insurance policy be taken [3] or assigned [4] in ignorance of the death of the insured, the mistake is intrinsic, since the parties contract upon the basis of his continued existence. Similarly, if the parties contract upon a particular understanding with respect to a given fact, there is an intrinsic mistake if the fact be different from the understanding of the parties.[5] Thus, in Hammond *v.* Allen,[6] the plaintiff gave the defendant an irrevocable power of attorney to collect a certain claim against the Portuguese government, the defendant to receive nearly one-third of the claim by way of compensation. At the time of this arrangement both parties were ignorant that the claim had already been allowed by the Portuguese government. *Held*, that the mistake is intrinsic, and ground for rescission. In Hitchcock *v.* Giddings,[7] the plaintiff bought of the defendant the defendant's interest in a certain remainder in fee after an estate tail, both parties understanding that the tenant in tail had not suffered a recovery. In truth, the tenant in tail had suffered a recovery. *Held*, that, since the parties contracted upon the basis that no recovery had been suffered, there is an intrinsic mistake which is ground for rescission. In all these cases, the court came to the conclusion that the parties came to a definite understanding with

[1] Lord Clifford *v.* Watts, L. R. 5 C. P. 577; Coturier *v.* Hastie, 5 H. L. Cas. 673; U. S. *v.* Charles, 74 Fed. 42; Scruggs *v.* Driver, 31 Ala. 274; Gibson *v.* Pelkie, 37 Mich. 380; Fritzler *v.* Robinson, 70 Ia. 500; Gribben *v.* Atkinson, 64 Mich. 651; Blake *v.* Lobbs Estate, 110 Mich. 608; Ridgley *v.* Conewago Iron Co., 53 Fed. 988; Cook *v.* Andrews, 36 Oh. St. 178; Buchanan *v.* Layne, 95 Mo. App. 148; Muhlenberg *v.* Henning, 116 Pa. 138. See also Howell *v.* Coupland, L. R. 1 Q. B. D. 258; Thompson *v.* Gould, 20 Pick. (Mass.) 134.

[2] Hastie *v.* Coturier, 9 Exch. 102.

[3] Pritchard *v.* Merchants', etc. Assoc., 3 C. B. N. S. 622.

[4] Strickland *v.* Turner, 7 Exch. 208; Scott *v.* Coulson, (1903), 2 Ch. 249.

[5] Fleetwood *v.* Brown, 109 Ind. 567; Sherwood *v.* Walker, 66 Mich. 568. But a change in the circumstances may be fatal to relief. Okill *v.* Whittaker, 2 Phillips 338.

[6] 2 Sumn. (U. S.) 387, affirmed in 11 Pet. (U. S.) 63.

[7] 4 Price 135.

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respect to the fact as to which they were both in error. It was the existence of this understanding which rendered the mistake intrinsic rather than extrinsic. Of course the condition was not always expressed in so many words. This the court seems to have deemed unnecessary. It seems to have been sufficient that the understanding actually existed. Perhaps the court went a good way in finding a conscious understanding. But this is a question of fact into which it is impossible to enter effectively in the absence of the witnesses and the evidence.

Where the mutual error touches some collateral matter of belief or inducement, as to which there is no understanding, it is extrinsic, and no ground for relief. The difference seems to be one of degree. Have we a belief only, or an understanding? That seems to be the test. Thus questions of value or quality are usually deemed extrinsic.[1] In Wood *v.* Boynton,[2] the parties bought and sold for one dollar a certain stone in the mutual and erroneous belief that it was a topaz. In truth, it was a diamond worth seven hundred dollars. *Held*, an extrinsic error which will not justify a rescission. A case very close to this, but which was decided the other way, is Chapman *v.* Cole.[3] There the plaintiff, being possessed of a gold coin, privately issued in California by one Moffat (and so not legal money), passed it away to B, who passed it to defendant, all parties mistaking it for a fifty-cent piece. *Held*, that the plaintiff may maintain trover for the coin, since, by reason of the error, no title passed to defendant. Again, several cases have held that, where A sells to B (without indorsement) the promissory note of C, both parties being ignorant that C is insolvent, the error is collateral, and no ground for relief.[4] In the same way, where A sold B distant lands under the mutual but erroneous belief that there was valuable timber thereon, the mistake was held incidental to the bargain and insufficient to justify rescission.[5]

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[1] See Hecht *v.* Batcheller, 147 Mass. 335; Sankey *v.* First Nat. Bank, 78 Pa. 48.

[2] 64 Wis. 265.

[3] 12 Gray (Mass.) 141.

[4] Hecht *v.* Batcheller, 147 Mass. 335; Day *v.* Kinney, 131 Mass. 37; Bicknall *v.* Waterman, 5 R. I. 43; Burgess *v.* Chapin, 5 R. I. 225. *Contra*, Harris *v.* Hanover Bank, 15 Fed. 786. But, if the note had been invalid, the error would have been intrinsic. Hurd *v.* Hall, 12 Wis. 112; Lawton *v.* Howe, 14 Wis. 241; Maldaner *v.* Beurhaus, 108 Wis. 25. See also Gordon *v.* Irvine, 105 Ga. 144; Brown *v.* Montgomery, 20 N. Y. 287.

[5] McCobb *v.* Richardson, 24 Me. 82. But *cf.* Thwing *v.* Hall & Ducey, etc. Co., 40 Minn. 184.

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Similarly, where the parties sold and purchased government bonds in ignorance that, by reason of extension of the time of maturity, they commanded a premium, the error was held to be collateral.[1] And where the parties arranged for a water supply from a particular source in ignorance that it would prove insufficient, the mistake was held extrinsic.[2] Again, where the parties bought and sold an incumbrance in the mutual and erroneous belief that it was a first incumbrance, whereas it was really a second incumbrance, the error was held collateral.[3] And where one partner buys out another partner's share, a mistake as to the value of the share was deemed not intrinsic.[4] In all these cases there was a mutual mistake. But the mutual error did not become the basis of the bargain actually made. It touched a reason for the contract, but was not a condition of it. Hence it was no ground for relief.

Mistake, then, has been classified with respect to the relief, with respect to the parties, and with respect to the subject matter. Mistake of the proper character is ground for rescission or for reformation, according to its nature. The two final questions, therefore, are, with respect to the kind of mistake which must be established as a basis for each kind of relief.

Reformation, as has been already shown, deals with the correction of writings. It leaves untouched the substance of the transaction. Indeed, the scope and purpose of it is to make the erroneous writing express the transaction correctly. Usually the transaction is a bargain founded on valuable consideration, but occasionally it is a gift. It is important to distinguish between transactions based on valuable consideration and gifts, since the nature of the transaction determines the requisites for reformation. Where the plaintiff seeks reformation of a writing intended to express a transaction based on valuable con-

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[1] Sankey *v.* First Nat. Bank, 78 Pa. 48.

[2] Dubois Borough *v.* Dubois, etc. Co., 176 Pa. 430.

[3] Sample *v.* Bridgforth, 72 Miss. 293.

[4] Dortic *v.* Dugas, 58 Ga. 484; Crowder *v.* Langdon, 3 Iredell Eq. (N. C.) 476; Stettheimer *v.* Killip, 75 N. Y. 283; Brown *v.* Fagan, 71 Mo. 563; Pearce *v.* Suggs & Pettit, 85 Tenn. 724. (In the two latter cases the court also invoked the doctrine that equity does not relieve a party from the consequences of his own negligence.) Klauber *v.* Wright, 52 Wis. 303. But it seems that, if an inventory be made, and the parties contract upon the understanding that the inventory is correct, an error in the inventory is an intrinsic mistake which is ground for relief. See De Voin *v.* De Voin, 76 Wis. 66; Meinecke *v.* Sweet, 106 Wis. 21. But *cf.* Kaiser *v.* Nummerdor, 120 Wis. 234 (Negligence in detecting error).

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sideration, he must establish three things with the requisite clearness.[1] First, he must show that the minds of the parties met upon a valid agreement which preceded the making of the writing, and which that writing is intended to express.[2] Second, he must prove the tenor of that prior agreement.[3] Third, he must show that by mutual mistake, or its legal equivalent, the writing fails to set forth the prior agreement correctly.[3] It is not enough to show a mistake by one party only.[4] In such a case, the parties are of equal merit. Neither version of the bargain is entitled to more weight than the other. The purpose of reformation is to prevent an error in reducing the bargain to writing from imposing on the parties a bargain which they never made. To reform for an error by one party only, where the writing correctly expresses the understanding of the other party, would work the very injustice which reformation is intended to prevent. It would impose on one party a bargain to which he never agreed. Yet a mutual error standing alone is not enough to justify reformation; the error must occur in reducing the prior bargain to writing and cause that writing to express the prior bargain incorrectly. The writing should not be reformed simply because it differs from the prior bargain, no matter how clearly this difference is proved. It may be that the parties have consciously modified the original bargain in reducing it to writing. Thus, if a term of the prior bargain be deliberately omitted from the writing, neither may later have this term inserted by reformation.[5] The writing must stand as the parties have chosen to make it. If, then, the writing be intended to embody a transaction founded on valuable consideration, there should be no reformation unless the plaintiff establish with the requisite clearness that, by reason of a mutual mistake, or its equivalent, the writing fails to set forth correctly the bargain on which the parties previously agreed.

There is, however, one equivalent which may be substituted for mutual mistake. Common honesty forbids a man to obtain or per-

[1] The proof must exceed a preponderance of the evidence and be "clear and satisfactory." Parker *v.* Hull, 71 Wis. 368; Glocke *v.* Glocke, 113 Wis. 303; Howland *v.* Blake, 97 U. S. 624. The unaided testimony of the plaintiff is not enough. McClellan *v.* Sandford, 26 Wis. 595. See also 16 Cyc. 70.

[2] See *ante*, p. 610, notes 3 and 4. Also Moehlenpah *v.* Mayhew, 138 Wis. 561, 573; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.). See 6 Pomeroy, Eq. Jur. § 675.

[3] Betts *v.* Gunn, 31 Ala. 219; Andrew *v.* Spurr, 8 Allen (Mass.) 412; Braun *v.* Wisconsin, etc. Co., 92 Wis. 245. See also Whittemore *v.* Farrington, 76 N. Y. 452.

[4] Kruse *v.* Koelzer, 124 Wis. 536. See 6 Pomeroy, Eq. Jur. § 676.

[5] See note 3, *supra*.

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fect rights with knowledge that the other party is laboring under a mistake. Equity will not permit him to reap the fruits of his dish nest silence. It will not avail him to say that the error ceased to be mutual because he discovered the mistake which he failed to correct. Such conduct amounts to fraud. If, then, by reason of mistake on the one hand, and knowledge of the error on the other, the writing fails to express the prior bargain correctly, equity will reform just as readily as if there had been mutual mistake.[1] Of course the mistake and fraud must be the cause of the incorrectness of the writing. They must intervene between the bargain and the writing just as mutual mistake must intervene; otherwise reformation is not the proper remedy. If the error and the knowledge thereof precede the making of the bargain, and the writing correctly expresses the agreement as it was actually made, there can be no reformation. The fraud of the defendant does not empower equity to make a bargain for him.[2] Yet the defendant will not be permitted to retain the fruits of his fraudulent conduct. Instead of reforming the writing, equity will rescind the whole transaction,[3] although some cases have given the defendant the option either to consent to reformation or to submit to rescission.[4] On the other hand, mistake and fraud in reducing the prior bargain to writing would not be ground for rescission. The bargain remains valid in spite of the subsequent misconduct of the defendant. The bargain is still a proper standard to which to reform the writing. Consequently the valid bargain should be affirmed by giving reformation.

If, however, the writing be intended to set forth a gift, instead of a transaction based on valuable consideration, the requisites for reformation are different. A gift is in truth a one party transaction. It is true that the donee must assent to the gift; otherwise no title could pass. But he is a passive party. He is simply a willing vessel into which the donor pours his bounty. The parties never intended to contract. If, then, a prior bargain were here required as a condi-

[1] Essex *v.* Day, 52 Conn. 483; Roszell *v.* Roszell, 109 Ind. 354; Welles *v.* Yates, 44 N. Y. 525; James *v.* Cutler, 54 Wis. 172; Venable *v.* Burton, 129 Ga. 537.

[2] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304. See also Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.).

[3] McCormick *v.* Miller, 102 Ill. 208; Clark *v.* Clark, 55 N. J. Eq. 814; Haviland *v.* Willets, 141 N. Y. 35; Harran *v.* Foley, 62 Wis. 584; Scott *v.* Coulson, (1903), 2 Ch. 249; Paget *v.* Marshall, L. R. 28 Ch. D. 255.

[4] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Paget *v.* Marshall, L. R. 28 Ch. D. 255; Harris *v.* Pepperell, L. R. 5 Eq. 1; Stone *v.* Moody, 47 Wash. 158.

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tion of reformation, reformation could never be given. Yet the reasons for reformation still exist. The writing may not correctly express the terms of the gift. The writing is intended to express the intention of the donor at the time the gift was made. This intention is the model to which the writing should be remoulded, provided that, through mistake, the writing gives more than the donor intended to give. It follows, also, that the error need not be mutual. The donor is the active and ruling party. The donee gives nothing for what he gets. All is clear gain to him. Since he has no voice either in determining the extent of the gift or the terms in which that gift shall be expressed, mutuality of mistake is no essential ingredient of the equities of the case. Reformation, in such a case, imposes no burden upon the donee. It simply decreases the benefit which he would otherwise derive from the donor's generosity. If, then, the donor shows with sufficient clearness that the writing failed to express his real intention at the time he made the gift, he should have reformation,[1] provided, of course, that the situation, at the time he seeks relief, raises no countervailing equity in favor of the donee. It follows, also, that the donor is the only party who can reform. If, through a mistake, the writing fails to include all that the donor intended to give, no equity is thereby raised in favor of the donee, as against the donor. A generous intention on the part of the donor, coupled with an error in reducing that intention to writing, does not create a contract which the donee may specifically enforce. The donee is a volunteer who must take things as he finds them.[2] It is true that there are cases which permit the donee to reform the writing after the death of the donor as against the donor's heirs.[3] But, if the donee had no equity against the donor in the donor's lifetime, it is hard to see how the death of the donor can raise one against those who take what the donor left. Moreover, such an equity seems to fly in the face of the Statute of Wills. The better reasoning seems to be with the cases which deny the donee relief against the heirs or next of kin on the ground that he

[1] Andrews *v.* Andrews, 12 Ind. 348; Lister *v.* Hodgson, L. R. 4 Eq. 30 (rescission given here); Day *v.* Day, 84 N. C. 408; Ferrell *v.* Ferrell, 44 S. E. 187 (W. Va.); Mitchell *v.* Mitchell, 40 Ga. 11; 6 Pomeroy, Eq. Jur. § 679, note 18.

[2] Shears *v.* Westover, 110 Mich. 505; Powell *v.* Morisey, 98 N. C. 426; Dennis *v.* Dennis, 4 Rich. Eq. (S. C.) 307; Hout *v.* Hout, 20 Oh. St. 119; Willey *v.* Hodge, 104 Wis. 81.

[3] M'Mechan *v.* Warburton, L. R. Ir. (1896), 1 Ch. D. 435; 6 Pom. Eq. Jur. § 679, note 17.

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is a mere volunteer.[1] If, then, the transaction be a gift, the donor should have reformation, if he shows that the writing fails to express his intention at the time he made the gift, but the donee, as a volunteer, should be refused relief, either against the donor or his heirs.

Rescission, as has already been shown, strikes down the bargain itself. Unless the mistake reaches the bargain, it will not justify this species of relief. Moreover, the mistake must be intrinsic.[2] It must touch and concern some matter which is actually a condition of the agreement.[3] An extrinsic error is no ground for relief.[3] An extrinsic error touches some matter of inducement, or some reason for making the agreement. But equity does not relieve a man from his contract because his reasons for making it were bad. To give relief in such a case would work a manifest wrong to the other party. Contracts are made in order to substitute an agreed certainty for the uncertainty of events. Such certainty is what each party pays for. If the bargain be rescinded, each party is remitted to the very uncertainty against which he sought to insure by making the agreement. When A seeks rescission of his agreement upon the ground of mistake, he offers his failure to form a correct mental picture of the situation as a reason why the Chancellor should deprive B of a right for which B has paid a price, the price being the consideration upon which the agreement rests. Of course the error may not be the fault of A. He may have been entirely without negligence in making the mistake. But *he* is the party responsible for the mistake. B may have shared in the error, but he is not the legal cause of it. Where there is no fiduciary relation between the parties, B is under no duty to guard A from error.[4] A must stand on his own feet and accept the consequences of his own acts. If A could escape from his agreement because he was mistaken in his reasons for making it, stability of contract would be destroyed. No contract would be safe. Unless the parties have chosen, either expressly or by implication, to make

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[1] Powell *v.* Powell, 27 Ga. 36; Enos *v.* Stewart, 70 Pac. 1005 (Cal.); and cases cited in p. 620, note 2.

[2] See *ante*, p. 615, notes 2–5 inclusive. Allen *v.* Hammond, 11 Pet. (U. S.) 63. Note 1 also contains some other cases in point.

[3] See *ante*, p. 616, notes 1–5 *et seq.* Kowalke *v.* The Milwaukee, etc. Ry., 103 Wis. 472, contains a very good discussion of this point, *obiter*.

[4] Dambmann *v.* Schulting, 75 N. Y. 55, 61; Graham *v.* Meyer, 99 N. Y. 611; Burgess *v.* Chapin, 5 R. I. 225, 228; Laidlaw *v.* Organ, 2 Wheat. (U. S.) 178, 195; Cleaveland *v.* Richardson, 132 U. S. 318, 329.

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the existence of some fact a condition of the agreement, a mutual mistake as to that fact is no ground for relief.

Of course what was said in the last paragraph applies only to cases of mistake. If there be fraud, a different rule applies. It is well settled that equity will relieve, where there is fraud, even where the fraud touches only matters of inducement. Indeed, it is not necessary that the fraud be the sole inducement to enter into the agreement.[1] Thus, where A is induced to contract by several material representations made by B, some true and some false, the fact that the false representations are not the sole inducement does not constitute a defense.[1] In the same way, if B, *at or before* the making of the agreement, knows that A is contracting under a mistake as to some matter of inducement, he cannot insist on the bargain.[2] It is true that, in this latter case, B does not affirmatively cause the mistake. So far, at least, his conduct is less dishonest than where B's own misrepresentations are the cause of A's misconception. For this reason, an action of deceit would probably not lie against him. But, when B stands by, knowing of the mistake, and permits A to contract, he is still guilty of unconscionable conduct. He grasps the contract rights with unclean hands. It is no longer open to him to urge that the error is only extrinsic. He is seeking to profit by his own wrong, and this the Chancellor will not permit. On the other hand, knowledge of the mistake must be actually or legally brought home to B in order to preclude him from insisting on the extrinsic character of the mistake as a defense. Thus negligence in discovering the facts cannot be substituted for knowledge of them. Even a surety, who makes no inquiry, cannot object that, if the creditor had used ordinary care in investigating the facts, the fatal fact would have been discovered.[3] It is the consciousness of the error at, or prior to, the making of the contract, which carries the case across the line from

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[1] Matthews *v.* Bliss, 22 Pick. (Mass.) 48; Safford *v.* Grout, 120 Mass. 20; Sioux Nat. Bank *v.* Norfolk, 56 Fed. 139; Tooker *v.* Alston, 159 Fed. 599; Edgington *v.* Fitzmaurice, 29 Ch. D. 459. And see also 20 Cyc. 41, notes 63 to 65.

[2] Gun *v.* McCarthy, L. R. Ir. 13 Ch. D. 304; Harran *v.* Foley, 62 Wis. 584; Scott *v.* Coulson, (1903), 2 Ch. 249; Haviland *v.* Willets, 141 N. Y. 35; Clark *v.* Clark, 55 N. J. Eq. 814; McCormick *v.* Miller, 102 Ill. 208.

[3] Tapley *v.* Martin, 116 Mass. 275; Bowne *v.* Mt. Holly Bank, 45 N. J. L. 360; Wayne *v.* Commercial Bank, 52 Pa. St. 343; Bennett *v.* Bldg. Assoc., 57 Tex. 72; Frelinghuysen *v.* Baldwin, 16 Fed. 452; see also Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 295.

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mistake into the realm of fraud. So long, then, as B cannot be charged either actually or constructively with notice of the mistake, at or prior to the making of the bargain, there can be no relief unless the error be intrinsic and mutual.

As we have seen, there should be no rescission, unless the error be intrinsic. But this necessarily involves the requirement that the mistake be mutual — or else known to the other party at or prior to the making of the contract. An intrinsic mistake is a mistake "as to one of the things actually contracted about."[1] But there can be no contract without a meeting of minds. If, then, the minds of the parties meet upon the subject matter and terms of the bargain, an error by one party only must of necessity be extrinsic. Of course an error by one party only may prevent the making of the bargain, since it may prevent the required meeting of minds. The meeting of minds may be verbal, but not actual. Thus, in Raffles *v.* Wichelaus,[2] the minds of the parties met verbally on the agreement to buy and sell certain cotton "ex Peerless" from Bombay. There was no uncertainty as to the wording of the agreement. But there was no contract because there were two ships called the Peerless, each Peerless sailed from Bombay, and each party had in mind a different vessel. In such a case, there can be no *rescission*, since there is no bargain to rescind. Of course, where the equities require it, there may be *cancellation;* that is to say, a destruction of the writing. Doubtless this is the meaning of the statement so often found in the cases, that an error by one party only may be ground for rescission.[3] Usually this statement occurs *obiter*, and the court has not in mind the distinction between cancellation and rescission, that is to say, the distinction between destroying a bargain on which the parties actually agreed, and destroying a writing which appears to define a bargain which never in truth existed. At any rate, when the case has actually arisen, the courts have almost uniformly refused to rescind a bargain on which the parties had actually agreed, for an error by one party only,[4]

[1] Dodge, J., in Kowalke *v.* The Milwaukee, etc. Ry., 103 Wis. 472, 477. See also *ante*, p. 613 *et seq.*, where the nature of intrinsic error is fully discussed.

[2] 2 Hurl. & Cort. 906.

[3] See Moffett, etc. Co. *v.* Rochester, 178 U. S. 373; Bibber *v.* Carville, 101 Me. 59. I have found but one case where the minds of the parties met and relief was actually given for an error by one party only, — Board of School Commrs. *v.* Bender, 36 Ind. App. 164. It seems hard to reconcile this with Lucas *v.* Owens, 113 Ind. 521.

[4] Bibber *v.* Carville, 101 Me. 59 (but notice that the decision is put partly on the ground of plaintiff's negligence), and cases cited *ante*, p. 612, note 1.

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where such error was unknown to the other party. Two of the cases, Steinmeyer *v.* Schroeppel[1] and Grant Marble Co. *v.* Abbot,[2] have been stated *supra* in the text. Moreover, these cases are in accord with the numerous authorities which hold that a surety who is induced to enter into the contract of suretyship by the fraud of the principal debtor has no defence against the creditor, unless the creditor had notice of the fraud at, or prior to, the making of the contract.[3] If even a surety, that favorite of the Chancellor, cannot avoid his contract where his error is due to the fraud of a third party, it seems clear that one who is responsible for his own mistake should have no relief. He must verify his reasons for contracting before he contracts. After the contract is made, it is too late for him to say that his reasons for making it were bad.

We have now considered mistake with reference to both reformation and rescission. It only remains to call attention to two general limitations on mistake as a ground for equitable relief. In the first place, the mistake must relate to some past or present fact.[4] The Chancellor does not give relief because the unexpected happened or the expected failed to occur. The same rule is applied in cases of fraud. A representation that something will take place in the future is no ground for relief, even though the representation fails to materialize. Future probabilities must always be a matter of uncertainty, although the uncertainty may be greater or less, according to circumstances. As to the future, then, each party must take his chance.

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[1] 226 Ill. 9. [2] 124 N. W. 264 (Wis.)

[3] Davis, etc. Co. *v.* Buckles, 89 Ill. 237; Lepper *v.* Nuttman, 35 Ind. 384; Jones *v.* Swift, 94 Ind. 516; Bank of Monroe *v.* Anderson, 65 Ia. 72 (*semble*); Martin *v.* Campbell, 120 Mass. 126; Radovsky *v.* Fall River Savings Bank, 196 Mass. 557; McWilliams *v.* Mason, 31 N. Y. 294; Casoni *v.* Jerome, 58 N. Y. 315; Page *v.* Krekey, 137 N. Y. 307 (*semble*); Howe, etc. Co. *v.* Farrington, 82 N. Y. 121; Kulp *v.* Brant, 162 Pa. St. 222; and see Fairbanks *v.* Snow, 145 Mass. 153 (duress); Brandt, Suretyship, §§ 456, 457. The same rule applies to ordinary contracts. Law *v.* Grant, 37 Wis. 548.

The question as to how far notice to an agent is notice to the principal is beyond the scope of this article. But in this connection Barker *v.* Pullman Palace Car Co., 124 Fed. 555, affirmed C. C. A. 134 Fed. 70, will be of interest. In that case it was held that, where two agents had power to negotiate only, but the principals reserved the power to conclude the agreement, an error mutual as to the agents was *not* mutual as to the principals, and hence such mutual error of the negotiating agents was not ground for reformation.

[4] Parke *v.* Boston, 175 Mass. 464; Southwick *v.* Memphis, etc. Bank, 84 N. Y. 420; Kowalke *v.* The Milwaukee, etc. Co., 103 Wis. 472, 477 (*semble*). See also 20 Am. & Eng. Encyc. 813. *Cf.* Miles *v.* Stevens, 3 Pa. St. 21.

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Broadly speaking, also, the Chancellor only helps those who help themselves. Courts of equity do not sit for the purpose of relieving the negligent from the consequences of their own carelessness. As we have already seen, the mistake is the work of the very party who pleads it as a reason for relief. It is going a good way to relieve a party from his contract, because of something which he himself has done. Certainly it seems reasonable for the Chancellor to refuse his aid to one who might have protected himself by using ordinary care at the time of making the agreement. If at law A may be made to respond in damages to one whose injury is the proximate consequence of A's negligence, it seems inconsistent for equity to give A relief because his negligence has recoiled on his own head. At law, also, contributory negligence is a bar to relief.

In this instance equity has followed the law,[1] though with some qualifications and hesitations.[2] Further discussion of these qualifications is outside the scope of this article. Here it is enough to say that relief is frequently, but not invariably denied to a party whose error is a consequence of his own want of reasonable care.

In summary, then, we have the following propositions:

1. To be a ground for relief the mistake must relate to a present existing fact and must not be due to a want of ordinary care on the part of the plaintiff.

2. If the plaintiff seek reformation of a writing intended to set forth a transaction based on valuable consideration, the plaintiff must establish a prior bargain upon which the parties agreed, and that by mutual mistake, or mistake on the part of the plaintiff, and knowledge thereof on the part of the defendant, that writing fails to express the prior bargain.

3. If the plaintiff seek reformation of a writing intended to set forth a gift, he must show that by mistake in reducing the terms of the gift to writing, the writing fails to express the donor's intention; but in such a case the donor is the only party who may obtain this relief, since equity will not interfere to increase the gift in favor of the donee who is a mere volunteer.

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[1] Placer County Bank *v.* Freeman, 126 Cal. 90; Bibber *v.* Carville, 101 Me. 59; Glenn *v.* Statler, 42 Ia. 107; Brown *v.* Fagan, 71 Mo. 563; Johnston *v.* Patterson, 114 Pa. St. 398; Pearce *v.* Suggs & Pettit, 85 Tenn. 724; Anderson *v.* Warne, 71 Ill. 20; Bostwick *v.* Mutual Life Ins. Co., 116 Wis. 392; Kaiser *v.* Nummerdor, 120 Wis. 234; Grant Marble Co. *v.* Abbot, 124 N. W. 264 (Wis.); Grymes *v.* Sanders, 93 U. S. 55; Shappirio *v.* Goldberg, 192 U. S. 232, 241; 2 Story, Eq., 13 ed., p. 225; 16 Cyc. 69.

[2] 6 Pomeroy, Eq. Jur. § 680, note 19; 2 Pom. Eq. Jur. § 856.



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4. If the plaintiff seek rescission, he must show that the parties entered into the agreement under a mutual mistake as to some matter actually contracted about; or else that the defendant became cognizant of the plaintiff's mistake at, or prior to, the making of the agreement.

It may be noted, then, that the general rule is that, whether the relief sought be rescission or reformation, the plaintiff must show either a mutual mistake, or else a mistake on his own part, coupled with knowledge thereof on the part of the defendant. The exception to this rule is the case where equity reforms a writing at the suit of a donor as against a donee who is a mere volunteer.

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# THE MEANING OF FIRE IN AN INSURANCE POLICY AGAINST LOSS OR DAMAGE BY FIRE

BY

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# THE MEANING OF FIRE IN AN INSURANCE POLICY AGAINST LOSS OR DAMAGE BY FIRE.

SUPPOSE that A procures insurance against loss or damage to his house by fire, that he kindles a fire in the house for a useful purpose and without intent to do injury, and that such fire does damage to the house. Suppose further that the fire is kindled by him in a place intended and provided therefor, and does the damage complained of by heat or smoke without causing flame or ignition outside the limits of such place. Suppose, on the other hand, that the fire kindled in the place provided for it starts a fire outside the limits of such place, and that this second fire does the damage. Can A recover under the policy in either event, and if so, when?

It is elementary that a policy of insurance is a contract by the insurer to indemnify the insured against loss by the casualty defined in the policy. The insured pays a sum certain for protection against an event which may or may not occur during the life of the policy. The premium is calculated with respect to the average chance that the given event will ever occur. This is especially the case with fire and marine insurance. It is true that in life insurance the insured is certain to die sometime. Death is an ancient custom for which civilization has as yet found no remedy. But even a life policy is essentially a contingent contract. The contingency is that the insured will die before reaching the average age of risks of his class. The premium is expected to cover the chance that this event will occur. Whether the policy be fire, marine, or life, contingency is the very essence of the contract.

An insurance policy, like other contracts, must be construed with reference to the circumstances under which it was made. The contingent nature of the contract is a controlling and vital circumstance. Indeed it qualifies the very language of the instrument. This language must be construed in the light of the fact

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that the premium is calculated upon the average probability of loss. If the insured intentionally causes the loss insured against, he strikes at the essence of the agreement. He intentionally substitutes a certainty for the contingency against which the parties contracted, and on which the premium was based. Even though the policy contains no express provision on the point, the nature of the contract precludes recovery under such circumstances.[1] If the insured intentionally burns the property he thereby avoids his fire policy.[2] If he commits suicide while sane his estate cannot recover upon his life policy.[3] If he intentionally destroys his ship the insurer has a defense to his marine policy.[4] Indeed, sufficiently grave misconduct on the part of the insured,[5] or of an agent for whom he is responsible,[6] is a bar, even though there be no intention to cause loss. Thus where the insured, while racing his steamer against another steamer, broached a barrel of spirits of turpentine close to the mouth of the furnace, in order to use the turpentine for fuel, and thereby set the steamer on fire, he was held to have forfeited his right to recover, although he neither intended nor desired to destroy the vessel.[7] And where the charterer of a vessel, with knowledge of the facts, tried to cross a very hazardous bar,

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[1] Vance, Insurance, 476, note 40; May, Insurance, § 407.

[2] Schmidt *v.* New York, etc. Ins. Co., 1 Gray (Mass.) 529; Kane *v.* Hibernia Ins. Co., 39 N. J. L. 697. But if the insured burn the property while insane his act is no defense to the insurer. Karow *v.* Continental Ins. Co., 57 Wis. 56.

[3] Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139; Supreme Commandery *v.* Ainsworth, 71 Ala. 436. The weight of authority, however, permits recovery by a *beneficiary*, even though the insured commit suicide while sane. Patterson *v.* Natural Premium, etc. Ins. Co., 100 Wis. 118, and cases cited; 21 HARV. L. REV. 530. This seems to rest on the theory, held in a number of states, that the beneficiary has a vested interest in the proceeds of the policy, and therefore ought not to be prejudiced by the improper act of the insured who, as to him, is deemed a third party for whom he is not responsible. *Cf.* notes 9–12, *post*.

[4] Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213.

[5] Chandler *v.* Worcester, etc. Ins. Co., 3 Cush. (Mass.) 328; Ostrander, Fire Insurance, 480; May, Insurance, §§ 407, 411. And see Gove *v.* Insurance Co., 48 N. H. 41.

[6] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244. See also Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213, where the barratry of the master and crew was held a defense to the insurer.

[7] Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386. But see Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388, where it was held that one who tried to burn out a bees' nest under the barn door, and thereby destroyed the barn, though without any fraudulent intent, was negligent, but was not guilty of such misconduct as would avoid the policy.

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without excuse, and thereby lost the ship, the insured was denied recovery, though neither he nor the charterer intended the loss, on the ground that the insured was legally responsible for the charterer's misconduct.[8] On the other hand, intentional burning of the property by a third party,[9] by the wife [10] or husband [11] of the insured, or even by the agent of the insured while acting beyond the scope of his authority,[12] will not bar recovery by the insured under a fire policy if the insured was not privy to the burning. In the same way destruction of the property by the municipal authorities in order to check the spread of fire is no defense to the insurer.[13] In other words, the peril intended and contemplated by the parties is a peril which is *accidental with respect to the insured.* Indemnity against casualty is the essence of insurance. The nature of the contract itself qualifies the words "death," "fire," or "peril of the sea," by adding the words "accidental with respect to the insured," precisely as if the latter phrase had been expressed.

Yet the fact that the loss is occasioned by the insured will not necessarily bar his recovery. Insurance policies are strictly construed against the insurer because he is usually the author of language used therein. The nature of the policy compelled the courts to hold that where the loss was caused intentionally or by the sufficiently serious misconduct of the insured, there could be no recovery, even though the policy made no express provision for such a case. Such a loss is not a casualty with respect to the insured. But the policy includes any accidental loss which falls within the risks specified. Intentional destruction by a third party without privity of the insured is an accident with respect to the policy-

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[8] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244.

[9] Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434. See also Hartford F. Ins. Co. *v.* Williams, 63 Fed. 925.

[10] Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Midland Ins. Co. *v.* Smith, L. R. 6 Q. B. D. 561, 568 (*semble*). See also Mickey *v.* Burlington Ins. Co., 35 Ia. 174 (negligent act of wife); Gove *v.* Insurance Co., 48 N. H. 41 (property burned by insane wife).

[11] Perry *v.* Mechanics', etc. Ins. Co., 11 Fed. 485; Plinsky *v.* Germania Ins. Co., 32 Fed. 47.

[12] Feibelman *v.* Manchester, etc. Assur. Co., 108 Ala. 180; Henderson *v.* Western, etc. Ins. Co., 10 Rob. (La.) 164.

[13] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323.

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holder. A loss innocently caused by the policy-holder is recoverable. In the same way the negligence of the insured or of his agents is deemed a casualty with respect to him. It is true that negligence increases the hazard, but the contingency has not been intentionally turned into a certainty by the insured. There is, therefore, a wide difference in degree between negligence on the one hand, and intentional destruction or misconduct on the other. Moreover, negligence is one of the normal human risks. If the negligence of the insured or his servant were a defense to the insurer, a great part of the value of the policy would vanish. These reasons have led the courts in insurance cases to look on negligence as an innocent accident, rather than as a breach of legal duty. As recovery for loss caused by the insured's negligence can scarcely be said to fly in the face of the policy, it has been generally held that the insurer must expressly except such negligence in order to rely on it as a bar. In the absence of such a stipulation negligence on the part of the insured or his agents is no defense to the insurer.[14] With respect to the policy-holder it is a casualty.

It is, of course, fundamental that where the casualty defined in the policy is fire, the loss for which recovery may be had must be proximately caused by fire within the usual meaning of that word. Scientifically we know that what we call fire is simply a chemical reaction by which oxygen unites with some substance to form a chemical compound. Yet not every such reaction is fire. The rusting of iron, the rotting of wood, the tarnishing of the base metals, are all examples of this reaction. But they are not fire. Fire implies flame or ignition. Thus damage caused by the rending effect of lightning,[15] without actual ignition, is not damage by fire. It has also been held that where property was charred by escaping steam, but without flame or glow, there was no loss within

[14] Vance, Insurance, 476; Ostrander, Insurance, 478; May, Insurance, § 408; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507; Waters *v.* Insurance Co., 11 Pet. (U. S.) 213; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434; Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388; Mickey *v.* Burlington Ins. Co., 35 Ia. 174; Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449; Wertheimer Co. *v.* U. S., etc. Ins. Co., 172 Mo. 135. In Karow *v.* Continental Ins. Co., 57 Wis. 56, the insured, who burned his property while insane, was allowed to recover.

[15] Kenniston *v.* Merrimack Ins. Co., 14 N. H. 341; Babcock *v.* Montgomery, etc. Ins. Co., 6 Barb. (N. Y.) 637; Babcock *v.* Montgomery, etc. Ins. Co., 4 N. Y. 326; Vance, Insurance, 482; Ostrander, Insurance, § 189; May, Insurance, § 406; Wood, Insurance, § 238.

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the meaning of the policy.[16] In the same way heat[17] or smoke[18] are not themselves fire, though damage by heat or smoke may be recovered if it be the proximate result of fire within the meaning of the policy.[19] Even injury by "spontaneous combustion" is not a loss by fire unless the combustion be sufficient to produce visible flame or glow. Thus in Western, etc. Co. *v.* Northern Assurance Co.[20] certain wool became wet and was destroyed by spontaneous combustion. The heat was so great that the wool could not be handled with bare hands, but at no time was there visible glow or flame. The court held that such combustion was not fire within the meaning of the policy. Flame, glow, or ignition, then, is an essential element of the fire casualty.

Yet there may be recovery under a fire policy even though the property injured was not even scorched, much less ignited. Generally speaking a fire policy covers not only damage done by the flames, but all damage which is the proximate consequence of fire within the meaning of the policy.[21] Thus in Lynn Gas, etc. Co. *v.* Meriden Fire Ins. Co.[22] a fire in the wire tower of the plaintiff caused a short circuit of the electric current, and this short circuit threw a sudden strain on a fly-wheel in another building and caused the fly-wheel to burst and do much damage. The property so injured was not even warmed by the fire, which was quickly put out. *Held*, that the whole damage is the proximate consequence of fire and so recoverable. In Ermentrout *v.* Girard, etc. Co.[23] a fire in the building of X caused the wall of that building to fall and injure the building of the plaintiff. *Held*, that this was a loss by fire. In the same way damage caused by water used to extinguish

[16] Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[17] Austin *v.* Drewe, 4 Camp. 360; American Towing Co. *v.* German, etc. Co., 74 Md. 25; Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[18] Cannon *v.* Phœnix Ins. Co., 110 Ga. 563; Fitzgerald *v.* German American Ins. Co., 62 N. Y. Supp. 824, 30 N. Y. Misc. 72; Samuels *v.* Continental Ins. Co., 2 Pa. Dist. Ct. 397; Austin *v.* Drewe, 4 Camp. 360.

[19] Way *v.* Abington Ins. Co., 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576.

[20] 139 Fed. 637. In 199 U. S. 608 a writ of *certiorari* was denied. *Cf.* Singleton *v.* Phenix Ins. Co., 138 N. Y. 298; Sun Ins. Office *v.* Western, etc. Co., 72 Kan. 41.

[21] Vance, Insurance, 476; Joyce, Insurance, § 2779; Wood, Insurance, §§ 105, 106.

[22] 158 Mass. 570.

[23] 63 Minn. 305.

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fire,[24] by removal to avoid fire,[25] by theft during a fire,[26] or even by destruction by the municipal authorities to prevent the spread of fire,[27] are all reckoned as damage by fire. Curiously enough, however, recovery has been denied for damage done by the concussion of a distant explosion of powder,[28] even though an explosion of powder [29] or inflammable vapor [30] is itself fire within the meaning of the policy. Such a loss seems quite as proximate a result of fire as the bursting of the fly-wheel in the Lynn case, *supra*. Certainly these explosion cases are not sufficient to shake the general rule that if the injury to the goods is due to fire as a proximate cause, the loss is recoverable under a fire policy, even though the goods themselves were never ignited. It must be noted, however, that in all these cases, the Lynn case and the explosion cases alike, a fire accidental with respect to the insured was one link in the chain of causation which led up to the injury. The question at issue was whether this link was sufficiently connected with the injury to be the proximate cause of it. It is manifest that such cases do not touch the question as to what is fire within the meaning of an insurance policy.

Fire, then, as used in an insurance policy, implies accidental combustion accompanied by visible flame or glow. Each ingredient is essential. Flame or glow, as an element of combustion, is essential because flame or glow is the earmark of the phenomenon known in common speech as fire. But the word "fire" is also modified by the circumstances under which it is used in the policy. The contingent nature of the contract is a controlling circumstance in its construction. This circumstance cuts down the general word "fire" to "fire which is accidental with respect to the insured."

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[24] Wood, Insurance, § 105; 19 Cyc. 828, note 46.

[25] Balestracci *v.* Firemen's Ins. Co., 34 La. Ann. 844; Independent Ins. Co. *v.* Agnew, 34 Pa. St. 96. But see Hillier *v.* Alleghany, etc. Ins. Co., 3 Barr (Pa.) 470.

[26] Wood, Insurance, § 106; Joyce, Insurance, § 2821; 19 Cyc. 828, notes 47, 48.

[27] See *ante*, note 13.

[28] Everett *v.* London, etc. Co., 19 C. B. N. S. 126; Caballero *v.* Home, etc. Ins. Co., 15 La. Ann. 217.

[29] Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356; Hobbs *v.* Northern Assur. Co., 12 Can. Sup. 631.

[30] Renshaw *v.* Fireman's Ins. Co., 33 Mo. App. 394; Renshaw *v.* Missouri, etc. Ins. Co., 103 Mo. 599. On the other hand, damage by the explosion of a steam boiler is not a loss by fire, since burning or combustion is not the central principle of such an explosion. Millaudon *v.* New Orleans Ins. Co., 4 La. Ann. 15.

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The nature of the contract renders this accidental ingredient essential. Unless, therefore, the accidental quality and the glow or flame quality coexist in the proximate cause of the injury, there can be no recovery under a fire policy.

In the light of these principles, the questions at the beginning of this article take on a new aspect. The flame or glow element is undoubtedly present. It is conceded that such flame or glow is the proximate cause of damage to the insured. But is the damage caused by a fire which is accidental with respect to the insured? On this point we must examine the authorities.

The leading case is Austin *v.* Drew,[31] in which the facts were as follows: The premises insured were a sugar manufactory of seven or eight stories. On the ground floor were pans for boiling sugar and a stove to heat them. From the stove a chimney went to the top of the building; and in the chimney was a register which had to be opened when there was fire in the stove. One morning a servant forgot to open the register and in consequence smoke, sparks, and heat were forced into the room where the sugars were drying. One or two men were suffocated in attempting to open the register, but it was finally opened. Had it remained shut much longer the premises would have been burnt down; but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were much damaged by the smoke and still more by the heat. The loss amounted to several thousand pounds. On these facts Chief Justice Gibbs thus instructed the jury:

"I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiffs' loss arose from negligent management of their machinery. The sugars were chiefly damaged by heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. . . . If there is a fire it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But

[31] 4 Camp. 360; Holt N. P. 126; affirmed, 6 Taunt. 436, 2 Marshall, 130.

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can this be said where the fire was never at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy nor a loss for which the company undertakes. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney."

In Cannon *v.* Phœnix Insurance Co.[32] the action was brought on a policy against "all direct loss or damage by fire." The proof of loss alleged that a certain stove-pipe in the plaintiff's building became disconnected, and that when a fire was built in the stove beneath, smoke and soot escaped into the second story of the building and did the damage complained of, which amounted to some three thousand dollars. The proof of loss also alleged that the stove-pipe and ceiling became very hot and that part of the damage was caused by water poured on to cool the ceiling. The defendant objected to the admission in evidence of the proof of loss, because the proof nowhere alleged that there was any fire except in the stove where it was intended to be. The trial judge excluded the evidence and there was a nonsuit. In affirming the ruling of the trial judge, Lewis, J., adopts and quotes the following principle, laid down in 1 Wood, Fire Insurance, § 103:

"Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, *so long as the fire itself is confined within the limits of the agencies employed*, as, from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not *purposely* caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies."

In American Towing Co. *v.* German Fire Insurance Co.[33] a steamtug, her boiler and machinery, were insured against "all loss or

[32] 110 Ga. 562. *Cf.* Mickey *v.* Burlington Ins. Co., 35 Ia. 174, where a fire kindled under similar circumstances set fire to the building, and the plaintiff recovered.

[33] 74 Md. 25. Compare with this Hazard *v.* New England, etc. Ins. Co., 7 Pet. (U. S.) 557; s. c. below, 1 Sumner (U. S.) 218; Martin *v.* Salem, etc. Ins. Co., 2 Mass. 420; and Rohl *v.* Parr, 1 Esp. 445, in which it was held that injury done by worms was not a "peril of the sea" within the meaning of a marine policy, but simply wear and tear for which there could be no recovery. And in Magnus *v.* Buttemer, 11 C. B. 876, recovery was denied where a vessel was intentionally allowed to take ground while unloading, though the policy covered "standing," because such an injury was mere wear and tear.

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damage to the same by fire." A fire occurred on board and did some damage to the hull. The boiler was also injured, but there was conflict in the evidence as to whether the damage to the boiler was caused by the exterior fire or by the fire in the furnaces beneath the boiler. The insurance company conceded its liability for the damage by the fire outside the boiler, and settled therefor. The trial judge instructed the jury in substance that if the damage to the boiler was caused by the fire in the furnaces, and not by fire outside the furnaces, the plaintiff could not recover under the policy. The plaintiff excepted to this instruction. In holding that the instruction was correct, Chief Justice Alvey said:

"The subject of the policy is a steam-tug, her boiler, and other machinery. Of necessity, fire was to be maintained in the furnace, and in contact with the boiler, as a means to generate the motive power by which the vessel could be propelled. . . . The fire while in the furnace was in its proper place and where it was intended to be, and it was placed there to act upon the boiler, which in course of time would be burnt out or warped, as the grate of the furnace would be, by the continued action of fire thereon. And if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of the fire while confined to the furnace and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney or warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of the fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured."

In Gibbons *v.* German Insurance and Savings Institution[34] the plaintiff sought to recover, under an ordinary fire insurance policy, for injury and charring caused by steam which escaped from the apparatus by which the rooms were heated. In affirming a judgment for the defendant, Gary, J., after citing Austin *v.* Drew, said:

[34] 30 Ill. App. 263.

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"The damage there, was the consequence of negligently omitting to open a proper outlet for the escape of the heat; here, by the accidental opening of an improper one. In each case there was excessive heat, but no fire where it ought not to have been. Fire and heat are not one, but cause and effect; and damage by heat is not insured against in terms and is covered by the policy only when the misplaced fire causes it. If the fire were a moral agent no blame could be imputed to it. It was doing its duty and no more. The damage was caused by another agent who, undertaking to transmit the beneficial influence of the fire, broke down in the task."

In Fitzgerald *v.* German-American Ins. Co.[35] the plaintiff brought action upon a policy against "loss or damage by fire," to recover for injury done by a smoking lamp. There was no fire outside of the lamp itself. In reversing a judgment for the plaintiff, Dunmore, J., said:

"The rule seems to be that where the insured employs fire for economic or scientific purposes, and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition to the property insured, the insurance company is not liable."

In Samuels *v.* Continental Ins. Co.[36] recovery was denied (though without opinion) for smoke damage caused by a flaring lamp, though the flame rose two or three feet above the chimney, but ignited nothing outside the lamp.

In Collins *v.* Delaware Ins. Co.[37] the plaintiff brought action on a fire policy for damage done by a fire in an oil stove. The evidence was conflicting as to whether the fire in the oil stove was confined to the wick, or spread to the oil reservoir. The trial judge in substance charged the jury that if the damage was due to smoke or heat caused by a fire in its proper place in the stove there could be no recovery, but that if the damage was caused by a fire out of its proper place they should find for the plaintiff. The jury found for the plaintiff and the defendant alleged exceptions. In overruling these exceptions Rice, P. J., quoted from Way *v.* Abington, etc. Ins. Co.,[38] and said:

"If a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or

[35] 62 N. Y. Supp. 824; 30 N. Y. Misc. 72.
[36] 2 Pa. Dist. Ct. 397.
[37] 9 Pa. Super. Ct. 576.

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scorch valuable furniture left too near it, or injure property by its smoke, which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, it may be conceded, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it, the insurance company would not be liable. . . . Again, as was said in Way *v.* Abington Mut. Fire Ins. Co.,[38] a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained." . . .

In Millaudon *v.* New Orleans Ins. Co.[39] the court affirmed a judgment which denied recovery under an ordinary fire policy for damage caused by an exploding steam boiler, where there was no fire except under the boiler.

In O'Connor *v.* Queen Insurance Co.[40] the plaintiff brought action on a standard policy which insured "against all direct loss or damage by fire." The evidence, as to which there was little if any dispute, was that the plaintiff's servant built a fire in the furnace with paper and cannel coal, not used or intended to be used for such purpose, which fire within a few minutes developed to such a degree of fury as to fill the house with great volumes of smoke, soot, and excessive and intense heat, whereby the property was damaged to the extent of some five hundred dollars. The trial judge ruled for the plaintiff. This ruling was affirmed by a divided court, Marshall, J., dissenting. At p. 394 Kerwin, J., thus distinguishes Austin *v.* Drew:

"The foregoing cases,[41] we think, fully show that Austin *v.* Drew, 4 Camp. 360, is not authority against plaintiff here. There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was, in the language of the books, a 'friendly' and not a 'hostile' fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended and in a measure uncontrollable, beside being inherently dangerous because of the unsuitable material

[38] 166 Mass. 67. [39] 4 La. Ann. 15. [40] 140 Wis. 388.

[41] These cases were cases like Lynn Gas Co. *v.* Meriden, etc. Ins. Co., *supra*, where a fire out of its proper place was the proximate cause of the damage, though the property injured was not itself ignited. For a fuller statement of the distinction between those cases and the O'Connor case, see the dissenting opinion of Marshall, J.



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used. Such a fire was, we think, a 'hostile' fire and within the contemplation of the policy."

In Way *v.* Abington Mut. Fire Ins. Co.[42] the plaintiff brought action on a Massachusetts standard fire policy to recover for

[42] 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576; Mickey *v* Burlington Ins. Co., 35 (Ia.) 174, *acc.*

In Massachusetts two unreported cases in the Superior Court, which were not carried up to the Supreme Court, supplement and are in accord with the *dictum* in Way *v.* Abington, etc. Ins. Co., *supra.* See also *dictum* in Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356, 360.

In Breen *v.* Ætna Ins. Co., Suffolk, 1895, No. 6102, the plaintiff declared in the usual manner on a fire policy, and the defendant answered the general denial. The bill of exceptions showed in substance that the defendant insured certain premises of the plaintiff against fire; that said premises were warmed by an ordinary stove; that before leaving the premises on a certain winter's night the plaintiff kindled a fire in said stove and set thereon a peanut roaster full of peanuts to warm over night; that by reason of the arrangement of the dampers of the stove the fire became unusually hot; that the unusual heat developed by the fire was sufficient to crack a wooden post near the stove; that the heat developed by said unusual fire caused the peanuts to give off a thick brown oily smoke which injured the goods and premises of the plaintiff to the extent of two or three hundred dollars; and that the peanuts themselves were eventually charred and consumed. At the close of the evidence the trial judge (Mason, C. J.) ruled that the plaintiff could not recover and directed a verdict for the defendant.

In Clark *v.* Fireman's Fund Ins. Co., Worcester, 1910, No. 8143, the plaintiff declared on a policy insuring his Stanley steam automobile against "loss or damage by fire arising from any cause whatsoever." The answer was a general denial. The case was tried without jury before Sanderson, J., who found as follows:

"The court finds that the plaintiff owned an automobile run by steam and insured by the defendant; that on September 17, 1909, he was operating this automobile on the highway when the water in the boiler became exhausted. The plaintiff filled the tank of the automobile with water and, supposing that it ran in the usual way into the boiler, started the automobile and ran it for some distance when he discovered that no water had gone into the boiler. When this was discovered the boiler was white with heat, the ends of the tubes had become fused and were emitting sparks, and flame was coming out causing damage to the paint, the mud guard, and the sill. The sparks emitted from the ends of the tubes indicated a burning in the sense that there was then an actual uniting of the metal with the oxygen of the air. The amount of damage to the boiler was $214.75, caused entirely by the action of the usual flame in the automobile confined in the place where it was intended to be, upon an empty boiler. The absence of water in the boiler was the proximate cause of the damage to the boiler. The court rules that the plaintiff cannot recover for this damage to the boiler.

"The damage to the paint, the sill, and the mud guard resulted from fire outside of the place where the fire was intended to be, for which the plaintiff is entitled to recover.

"The amount of this damage is thirty-five dollars, with interest from the date of the writ."

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damage done by smoke thrown off by a fire in the plaintiff's chimney, which fire was caused by a fire lighted in the stove below. There was no fire except in the stove and in the chimney. The trial judge ruled that the plaintiff could recover. In overruling the defendant's exceptions, Knowlton, J., after stating at some length the argument that there could be no recovery because there was no fire except where fire was intended to be, said:

"We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected and injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

In Brown *v.* Kings County Fire Ins. Co.[43] it was held that the insured could recover where he placed a certain rather inflammable ointment on the stove to heat and the ointment ignited and caused the fire complained of.

Another group of cases also bears on the question. Fire policies frequently except explosion of any kind from the peril insured against. Thus the standard fire policy excepts all loss by explosion unless fire ensues, and then imposes liability only for the loss by fire. Explosion, however, may be due to the ignition and rapid combustion of explosive vapor. Sometimes the igniting cause is a gas flame, lighted match, or lighted lamp. Counsel have frequently urged that the gas flame, lamp, or the like is itself fire, that such fire is the proximate cause of the explosion, and that the damage done by the explosion is the proximate result of this precedent fire and so recoverable as a loss by fire irrespective of the explosion ex-

[43] 31 How. Pr. (N. Y.) 508.

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ception. This contention has almost invariably failed. It has frequently been held in such a case, that a lighted match,[44] a lighted lamp,[45] a lighted gas jet,[46] or even a furnace fire [47] is not a fire within the meaning of the policy. On the other hand, if an accidental and destructive fire precede the explosion, and the explosion is caused by such fire, the explosion is simply an incident of such destructive fire and the whole loss may be recovered as a fire loss.[48] If, then, the fire policy except damage by explosion, and an explosion occur, the question whether the explosion damage may be recovered as a loss by fire turns on the nature of the fire which preceded and caused the explosion. If the precedent fire be intentionally kindled by the insured for a useful purpose in a place provided therefor, it is not fire for which there can be recovery even though it cause the explosion. If, however, the precedent fire be an accidental fire with respect to the insured, then the damage by explosion is treated as a fire loss, in spite of the explosion exception in the policy. It is evident, therefore, that these explosion cases illustrate very neatly the distinction between accidental and non-accidental fires.

Another question which was suggested by the original case of Austin *v.* Drew still remains to be considered. In that case the court pointed out that the fire was confined to the place intended for it and that it was not excessive. Which factor controls the decision? The direct decisions on this point are singularly few. The explosion cases just discussed do not raise the point on the facts. In each the gas flame, lamp flame, or match flame which caused the explosion seems to have been of the usual size, though this factor seems not to have been noted or relied on. The fire seems not to have been excessive in Cannon *v.* Phœnix Insurance Co., American Towing Co. *v.* German Fire Insurance Co., and Gibbons *v.* German Insurance and Savings Institution, but in none of these

[44] Heuer *v.* Northwestern, etc. Ins. Co., 144 Ill. 393; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Ia. 555.

[45] German-American Ins. Co. *v.* Hyman, 42 Colo. 156; Briggs *v.* North American, etc. Ins. Co., 53 N. Y. 446.

[46] Home Lodge Assur. *v.* Queen Ins. Co., 21 S. Dak. 165; United Life, etc. Ins. Co. *v.* Foote, 22 Oh. St. 340.

[47] St. John *v.* American, etc. Ins. Co., 11 N. Y. 516.

[48] Washburn *v.* Farmers' Ins. Co., 2 Fed. 304; Washburn *v.* Miami, etc. Ins. Co., 2 Fed. 633; Washburn *v.* Artisans' Ins. Co., Fed. Cas. No. 17,212; Washburn *v.* Western Ins. Co., Fed. Cas. No. 17,216; Stephens *v.* Fire Assoc., 139 Mo. App. 369; Vance, Insurance, 480, and see *ante*, notes 44–47.

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cases is the non-liability of the insurer placed on that ground. In each case the court relies entirely on the fact that there was no fire except where fire was intended to be. In Samuels *v.* Continental Ins. Co. the flame streamed two or three feet above the lamp chimney, and the court, without opinion, denied recovery. In Fitzgerald *v.* German-American Ins. Co., the other smoking lamp case, it may be inferred that the flame was unusually high, but the court nowhere mentions it.

In Way *v.* Abington Mut. Fire Ins. Co., Collins *v.* Delaware Ins. Co., and Brown *v.* Kings County Ins. Co. the original intentional fire caused a second accidental fire. In the Way case and the Collins case the liability of the plaintiff is placed expressly on the existence of fire where fire was not intended to be, while in the Brown case the point seems to be assumed. In O'Connor *v.* Queen Ins. Co., however, the court permitted recovery because of the excessive and unusual nature of the fire, even though the fire was apparently confined within the place where fire was intended to be; but this position is vigorously assailed in the dissenting opinion of Marshall, J. In this respect the reasoning of practically all the other cases, the text-writers,[49] and *dicta* in Way *v.* Abington Mut. Fire Ins. Co. and American Towing Co. *v.* German Fire Ins. Co., seem to support Justice Marshall. The actual decisions in Samuels *v.* Continental Ins. Co. and in Fitzgerald *v.* German-American Ins. Co. also look the same way. Until O'Connor *v.* Queen Ins. Co. the locus and origin of the fire were treated by courts and text-writers alike as the ground of decision.

The view which makes the locus and origin of the fire the test of its accidental or non-accidental quality with respect to the insured seems more in accord with principle and with authority. The occurrence of fire damage without more cannot be the test. One who intentionally burns the property on which he procured insurance does not recover because the property is ruined. Even though live steam escape from a radiator and do injury, the nature of the furnace fire remains unchanged. The fire in the stove cannot acquire an accidental origin because it scorches a valuable chair. The fire in the fireplace does not become a casualty with respect

[49] Vance, Insurance, 477; Ostrander, Fire Insurance, § 188; Wood, Insurance, § 103; May, Insurance, § 402; Joyce, Insurance, § 2779, 2796; Richards, Insurance Law, 3 ed., 284; Clement, Fire Insurance, 86 and 87.

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to the insured because smoke escapes from the chimney and soils his pictures. The consequences which flow from a fire intentionally kindled by the insured can no more reach back and change the nature of that fire than a conclusion can alter the premiss on which it is based.

The size of the fire affords no satisfactory test of its character with respect to the insured. The fact that the lamp was intentionally lighted by the insured still remains, even though the lamp flame stream two feet above the chimney and cast off smoke. Even though the fire in the furnace burn with great fury and fill the house with unintended smoke and heat, there is no fire except that which was intentionally kindled by the servant. Of course, a fire intentionally lighted in a place provided for it may start another fire accidentally outside such place. But such a case must be sharply distinguished from the case where the intentional fire gives out an unusual or unintended amount of heat or smoke. In the former case there are two fires, one intentional and one accidental; in the latter case merely accidental consequences of a fire intentionally kindled by the insured. It is manifest that such consequences cannot reach back and alter the character of the fire which caused them. That character was fixed before the unusual heat or smoke was developed. It follows that it is not material whether the fire which caused the injury was excessive or not excessive. The locus and origin of the fire, not its size, is the logical and proper test of its accidental character.

One other point remains to be considered. Suppose that the injury is caused in part by the accidental fire outside the place intended, and partly by the intentional fire within such place, what is the measure of damages? On this point the writer has found no direct reported decision.[50] But on principle the question seems covered by the cases already discussed. A non-accidental fire is not fire within the meaning of the policy. Even though such fire cause damage it is not recoverable. The result should be the same where the damage is caused in part by an accidental and in part a non-accidental fire. It seems to follow, therefore, that only damage due to the fire outside the place intended should be recovered.[51]

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[50] But see Clark *v.* Fireman's Fund Ins. Co., reported by the author, *supra*, note 42.

[51] See Beakes *v.* Phœnix, etc. Co., 143 N. Y. 402; Warmcastle *v.* Scottish, etc. Ins.

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In summary, then, we have the following propositions:

1. Fire, within the meaning of an ordinary insurance policy, means combustion which is accidental with respect to the insured, accompanied by visible flame or glow.

2. If the insured, or one for whom he is legally responsible, kindles a fire with intent to injure the premises insured, such fire is not fire within the meaning of the policy for want of the accidental quality.

3. If the insured, or one for whom he is legally responsible, kindles a fire for some useful purpose and without intent to do injury, in a place intended and provided for said fire, such fire while confined within such place is not fire within the meaning of the policy, and any damage done thereby by smoke or heat is not recoverable.

4. The reasoning of the cases and of the text-writers indicates that the same rule would be applied even though such fire so kindled in the place intended therefor were excessive or of unusual size, but the rule in Wisconsin is the other way.

5. If the fire intentionally kindled in a place provided therefor, accidentally causes combustion accompanied by flame or glow outside the limits of the place where the original intentional fire was kindled, the second, or accidental, fire is fire within the meaning of the policy, and any damage done by such accidental fire is recoverable.

6. It seems to follow that where damage is caused in part by an intentional fire and in part by an accidental fire, only such damage as was caused by the accidental fire may be recovered.

In a word, fire, as used in an ordinary fire policy, means fire which is accidental with respect to the insured. Moreover, the accidental quality must attach to the fire itself. An intentional fire plus accidental damage do not constitute accidental fire. In such a case the accidental quality attaches to the loss alone and is no part of the flame which caused the loss. But it is the cause of the loss, not the occurrence of loss, which determines whether

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Co., 201 Pa. St. 302; German Am. Ins. Co. *v.* Hyman, 42 Colo. 156. In each of these cases the evidence tended to show that part of the damage was due to a cause included in the policy and that part was due to a cause excepted from the policy. The court in each instance held that the burden was on the plaintiff to show how much of the damage was due to the cause included in the policy and that failure to confine the plaintiff to that measure of damage was reversible error.

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there may be recovery. A fire kindled by the insured in a place provided therefor is an intentional fire. It cannot acquire the necessary accidental quality because smoke or heat evolved thereby does damage. The lack of this essential accidental quality *in the fire itself* is fatal to recovery.

*Edwin H. Abbot, Jr.*

CAMBRIDGE, MASS.

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Edwin H. Abbot Jr



# RES JUDICATA AS A FEDERAL QUESTION.

SUPPOSE that in an action brought in a state court by A. against B., B. pleads in bar a judgment rendered in a prior action between the same parties. Suppose further that the trial court rules upon the validity and effect of the judgment and that these rulings are affirmed by the highest court of the state. Can the correctness of these rulings be tested by a writ of error in the Supreme Court of the United States?

It is, of course, familiar law that a case cannot be carried by a writ of error from a state court to the Supreme Court of the United States except in respect of federal questions which are necessary to the decision.[1] But a question is not federal unless it involves a right arising under the Constitution or laws of the United States.[2] The United States Constitution, however, takes care of certain classes of judgments. Thus Article IV, Section 1, provides that

"full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Pursuant to the authority so conferred, Congress in 1804 enacted what is now Section 905 of the Revised Statutes.[3] Within the protection of the constitutional provision and of this section of the statute come the judgments of the court of a sister state,[4] of

[1] Eustis *v.* Bolles, 150 U. S. 361, 14 Sup. Ct. 131 (1893).

[2] Eustis *v.* Bolles, *supra.*

[3] This section provides: "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken"

[4] Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. 224 (1892).

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the District of Columbia,[5] and of a territory.[6] And it is within the judicial power vested by the Constitution in the Supreme Court to correct upon a writ of error a failure by a state court to give full faith and credit to the judgment of a federal court.[7] If, then, a state court fail to give full faith and credit to one of the judgments just enumerated, a right arising under the Constitution and laws of the United States is violated. Consequently a writ of error to the state court will lie to redress the wrong.

But suppose that instead of giving too little faith and credit to one of the enumerated judgments a state court gives too great effect thereto. Assume that in the jurisdiction where the judgment was rendered it forecloses issues A. and B. Assume further that when the judgment is pleaded in another state and its effect is thereby drawn in question, the state court erroneously holds that it forecloses issues A., B., and C. Will a writ of error lie to the United States Supreme Court at the instance of the party thereby aggrieved?

It may well be argued that in such a case the state court has not failed to give "full faith and credit." On the contrary, it may be urged that it has given "full faith and credit" and something more. But this argument assumes that the words of the Constitution simply prescribe a minimum below which the state court must not fall. It construes the Constitution as if it read: "Not less than full faith and credit shall be given." On the other hand, it may well be argued that the words of the Constitution not only confer a right but also define the extent of that right. The words "full faith and credit" would then operate as words of definition. They would compel the court to go just so far, and would prevent it from going farther. On this theory the party who pleads the judgment may insist that it receive not less than full faith and credit, while the party against whom it is pleaded may object if it receive more than full faith and credit.

This is the construction adopted by Congress in enacting Section 905 of the Revised Statutes. That section provides that the judgments therein enumerated,

[5] Embry *v.* Palmer, 107 U. S. 3, 25 Sup. Ct. 5 (1882).

[6] Gibson *v.* Manufacturers', etc. Ins. Co., 144 Mass. 81, 10 N. E. 729 (1887); Suesenbach *v.* Wagner, 41 Minn. 108, 42 N. W. 925 (1889).

[7] Crescent City, etc. Co. *v.* Butchers', etc., Co. 120 U. S. 141, 7 Sup. Ct. 472 (1887); Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130 (1874).

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"shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Perhaps it might originally have been argued that in so defining the words of the Constitution Congress has exceeded its powers. But Article IV, Section 1, expressly confers power upon Congress to prescribe the effect of judgments within its scope. And this statute has stood in its present form since 1804. Moreover, it has frequently been before the Supreme Court (though always where the writ of error was brought upon the ground that the state court below had not given sufficient faith and credit to the judgment drawn in question), and has again and again been applied. It seems too late, therefore, to urge successfully that the statute is unconstitutional, or that the words of the Constitution do not forbid a state court to give too much faith and credit as well as too little to a judgment of a court of a sister state, of a territory, or of the District of Columbia.

It seems strange that the question has not been set at rest by a square decision, but the writer has found no such case. The point was raised, it is true, in a recent case,[8] but the Supreme Court in holding that the state court below had given the proper measure of faith and credit to the judgment in question failed to decide it. There are, however, a considerable number of *dicta* which indicate that a writ of error would lie to a state court under such circumstances.

Thus in Board of Public Works *v.* Columbia College[9] the court said, *obiter*, through Field, J.:[10]

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[8] Everett *v.* Everett, 215 U. S. 203, 30 Sup. Ct. 70 (1909). The facts are worth noting. The plaintiff brought action in New York to set aside on the ground of fraud a decree annulling her marriage to the defendant. The defendant pleaded in bar that the plaintiff had brought against him in the Probate Court of Massachusetts a petition for separate support, that he there pleaded in bar the New York decree annulling his marriage, and that the Massachusetts Court thereupon dismissed the petition. The New York court (Everett *v.* Everett, 180 N. Y. 452, 73 N. E. 231 (1905)) held that the Massachusetts judgment concluded the plaintiff in respect to the validity of the original New York decree, and this ruling was affirmed by the Supreme Court of the United States. For other cases in accord as to the effect as *res judicata* of an adjudication as to the validity of a prior judgment see Bidwell *v.* Bidwell, 139 N. C. 402, 52 S. E. 55 (1905); Dobson *v.* Pearce, 12 N. Y. 156 (1854); Peet *v.* Hatcher, 112 Ala. 514, 21 So. 711 (1895); Fauntleroy *v.* Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

[9] 17 Wall. (U. S.) 521 (1873).

[10] *Ibid.* 529.

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"No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on that subject."[11]

And in Crescent, etc. Co. *v.* Butchers', etc., Co.[12] the court said, *obiter*, through Matthews, J.:[13]

"It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question."[14]

Again, in Tilt *v.* Kelsey[15] it was said, *obiter*, through Moody, J.:[16]

"They [the judgments] can have no greater or less or other effect in other courts than in those of their own state."

It is manifest that a judgment of a court of the same state in which such judgment is pleaded is not within Article IV of the Constitution, or Revised Statutes, Section 905.[17] It is not a judgment of a different state. Nor can the judgment of a court of a foreign country claim the protection of that article or statute.[18] A foreign country is not a state within the meaning of Article IV. As to such judgments, therefore, the question is whether they can claim the protection of some other provision of the Constitution.

It may be conceded that the effect to be given to the judgment of a court of a foreign country might be prescribed by treaty.[19] And

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[11] For another *dictum* in accord see Robertson *v.* Pickerell, 109 U. S. 608, 611, 3 Sup. Ct. 407, 409 (1883).

[12] 120 U. S. 141, 7 Sup. Ct. 472 (1887). [13] *Ibid.* 147.

[14] For other *dicta* in accord see Dupasseur *v.* Rochereau, 21 Wall. (U. S.) 130, 135 (1874); Metcalf *v.* Watertown, 153 U. S. 671, 676, 14 Sup. Ct. 947 (1894); Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 645, 20 Sup. Ct. 506 (1900); Pittsburgh, etc. Ry. Co. *v.* Long Island, etc. Trust Co., 172 U. S. 493, 510, 19 Sup. Ct. 238 (1899).

[15] 207 U. S. 43, 20 Sup. Ct. 1 (1907). [16] *Ibid.* 57.

[17] Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

[18] Hilton *v.* Guyot, 159 U. S. 113, 16 Sup. Ct. 139 (1895).

[19] See *In re* Ross, 140 U. S. 453, 11 Sup. Ct. 897 (1891) (powers and procedure of United States Consular Court in Japan).

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since treaties with foreign nations are part of the supreme law of the land[20] a federal question would be presented if a right under such treaty were drawn in question.[21] But aside from such a treaty a ruling by a state court upon the validity or effect of a judgment of a court of a foreign country can rise no higher, as presenting a federal question, than a ruling by the same court upon the validity or effect of one of its own judgments. These two classes of judgments will therefore be treated together.

It is elementary that a valid and well-pleaded judgment operates by way of estoppel. The question therefore is whether a ruling of a state court upon the effect as an estoppel of a judgment of its own or of a foreign court necessarily draws in question any right under the Constitution or the federal law. It may be argued that if the court erroneously finds an estoppel where none existed, it has deprived the party aggrieved of his day in court. It may also be argued that if the court erroneously fails to give full effect to the judgment it has impaired the obligation of contract. Each contention, if it be sound, manifestly draws in question a constitutional right.

Suppose, then, that the state court has failed to give due effect by way of estoppel to a judgment of its own or of a court of a foreign country. Has it impaired the obligation of contract? It may be admitted that text writers have called a judgment a contract of record, and that an action thereon sounds in contract and not in tort. It is also true that state statutes which impaired judgments founded on agreements express or implied and thereby impaired the original obligation have been held to offend against the constitutional prohibition.[22] But that was because the original contractual obligation was impaired, not because of interference with the judgment.[23] If the cause of action was not founded on a contract, reduction of it to judgment will not confer contractual character. A judgment is not born of a meeting of minds nor created by mutual assent. Hence a judgment founded on a tort[24] or on an award of commissioners in eminent domain proceedings[25]

[20] U. S. Const., Art. VI. [21] See also U. S. Const., Art. III, Sec. 2.

[22] Louisiana *ex rel.* Nelson *v.* St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648 (1884).

[23] Louisiana *ex rel.* Nelson *v.* St. Martin's Parish, *supra.*

[24] Louisiana *v.* Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211 (1883); Freeland *v.* Williams, 131 U. S. 405, 9 Sup. Ct. 763 (1889).

[25] Garrison *v.* City of New York, 21 Wall. (U. S.) 196 (1874).

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is not a contract within Article I, Section 10, of the Constitution. It is clear, therefore, that judgments, simply as judgments, cannot claim the protection of this constitutional provision.

But even judgments founded upon a contract express or implied have no special sanctity by way of estoppel under Article I, Section 10. The question whether a contract has come into being, or whether, if valid, its scope is greater or less, raises no question as to impairment of the obligation of contract by the law of a state.[26] Clearly, therefore, a ruling upon the validity or invalidity of a judgment, or upon the nature and scope of the issues concluded thereby under the principle of *res judicata*, cannot raise any question with respect to impairing the obligation of contract. It follows that a failure of a state court to give sufficient effect as an estoppel to one of its own judgments,[27] or to a judgment of a court of a foreign nation, does not raise a federal question.

But suppose that a state court gives too great effect, by way of estoppel, to one of its own judgments or to a judgment of a court of a foreign country. Is the party aggrieved thereby deprived of due process of law or of the equal protection of the laws within the meaning of the Fourteenth Amendment? It is manifest that a judgment may fail as an estoppel for want of jurisdiction over the party sought to be bound,[28] or because it does not foreclose the issue in question.[29] In the one case the question is whether any estoppel exists as against this defendant; in the other, as to whether a given estoppel as against this defendant covers the case at bar. This distinction, as we shall see, is important. A personal judgment rendered without personal jurisdiction is a nullity.[30] To give any effect thereto is a denial of due process of law.[30] And this is true even where the judgment is rendered in the same state where it is drawn in question.[31] If, then, a state court give effect to a judgment rendered in the same state, which judgment is a nullity for want of jurisdiction, the party aggrieved may take the case to the Supreme Court of the United States upon writ of error.[31]

[26] Railway Co. *v.* Rock, 4 Wall. (U. S.) 177 (1866).

[27] Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 Sup. Ct. 471 (1896).

[28] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Hall *v.* Lanning, 91 U. S. 160 (1875); Brown *v.* Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702 (1908).

[29] Hughes *v.* United States, 4 Wall. (U. S.) 232 (1866).

[30] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

[31] Scott *v.* McNeal, 154 U. S. 34, 14 Sup. Ct. 1108 (1893).

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This was squarely decided in Scott *v.* McNeal.[32] In that case Scott brought against McNeal an action of ejectment in the Superior Court of Thurston County, Washington. Scott proved title in himself in 1888. McNeal then offered in evidence a judgment of the Probate Court of Thurston County, which adjudged Scott to be dead and granted administration upon his estate. Under this decree an administrator was appointed who, pursuant to an order of court, sold the lands in question to one Ward, under whom the defendant claimed. The Superior Court held the probate proceedings to be valid, and the Supreme Court of Washington affirmed the judgment, whereupon the case was brought to the Supreme Court of the United States upon a writ of error. That court held that a probate proceeding upon a living person was void for want of jurisdiction; that to give effect to such a proceeding even in the same state was a denial of due process of law; and that the Supreme Court had jurisdiction upon a writ of error to the state court to review and reverse such a judgment.

We now pass to the other branch of this question. Assuming that a judgment of a court of the same state or of a foreign country binds the parties, and that the only question is as to the extent of the estoppel thereby created, is it a denial of due process if the court erroneously give too wide effect to such estoppel? Here again there is a singular dearth of authorities.

In Gilles *v.* Stinchfield,[33] Stinchfield brought action in the Superior Court of Tuolumne County, California, to recover the value of certain gold alleged to have been taken from the plaintiffs' mining claim by the defendants. One branch of the case involved a question under certain sections of the Revised Statutes of the United States, but the California court decided against the defendant upon the ground of an alleged estoppel by deed. In dismissing the writ of error the United States Supreme Court said, through Chief Justice Fuller:

"But the decision of the Supreme Court [of California] was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the Statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad

[32] 154 U. S. 34; 14 Sup. Ct. 1108 (1893).
[33] 159 U. S. 658, 16 Sup. Ct. 131 (1895).

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enough to maintain the judgment. The writ of error must, therefore, be dismissed."

In Phœnix, etc. Ins. Co. *v.* Tennessee[34] the plaintiff (Tennessee) brought action to recover certain taxes. The defendant insurance company pleaded in bar a certain judgment rendered in the same state. The trial court held the judgment to be no bar, and this was affirmed by the Supreme Court of Tennessee. The United States Supreme Court in affirming the judgment below said, through Brewer, J.:

"We think the decision of the Supreme Court [of Tennessee] as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. . . . If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here."

In Beals *v.* Cone[35] the plaintiff brought action in the state court of Colorado with respect to a certain mining claim. One contention of the plaintiff was as to the existence of an alleged estoppel *in pais* against the defendant. The Supreme Court of Colorado ruled against the plaintiff, who sued out this writ of error. In dismissing the writ for want of jurisdiction the United States Supreme Court said, through Brewer, J.:

"The estoppel was not of record but *in pais*, arising, as contended from contradictory statements made by one of the defendants, at a different time and place. Whether such statements work an estoppel depends not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law."

In Schaefer *v.* Werling[36] the question was as to the validity of a certain paving assessment. One defense claimed by the lot owner (Schaefer) was an estoppel *in pais*. The trial court ruled against the estoppel, which judgment was affirmed by the Supreme Court of Indiana. In affirming the judgment, Brewer, J., said:

"It may be observed that, so far as the question was one of estoppel, it was purely a state and not a Federal question."

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[34] 161 U. S. 174, 16 Sup. Ct. 471 (1896).
[35] 188 U. S. 184, 23 Sup. Ct. 275 (1902).
[36] 188 U. S. 516, 23 Sup. Ct. 449 (1902).

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It must be noted, however, that none of these cases decide our precise question as to the effect of giving too wide scope to a judgment of a court of a foreign country or of the same state. In Phœnix, etc. Ins. Co. *v.* Tennessee the alleged error was a failure to give sufficient effect as an estoppel to the judgment in question. The language quoted, it is true, is sufficient to cover our problem. But it goes too far, unless that case is to be distinguished from Scott *v.* McNeal on the ground that in the McNeal case the judgment was a nullity, while in the Tennessee case the judgment was admittedly valid and the only question was as to its effect as an estoppel. In Beals *v.* Cone and Schaefer *v.* Werling, also, the alleged error was a refusal to find an estoppel *in pais*. Neither, therefore, decide what is the effect of erroneously finding and giving too great effect to an estoppel by judgment. In Gilles *v.* Stinchfield, however, the error alleged was that the California court erroneously found an estoppel by deed, and it was held that this presented no federal question. That case, therefore, indicates that to sustain an estoppel by deed, even erroneously, does not violate the Fourteenth Amendment.

If, then, the estoppel created by a valid judgment of a court of the same state or of a foreign country is to be treated like questions of estoppel *in pais*, or by deed, the question is whether the Fourteenth Amendment guarantees to every litigant as an element of due process the right to litigate every relevant issue in his case. Logically it seems somewhat difficult to distinguish between raising an estoppel by a void judgment and erroneously extending the estoppel raised by a valid judgment. In each case the litigant is improperly prevented from litigating an issue which he is legally entitled to litigate. There is, however, a difference in degree if not in kind. And there are a good many authorities which indicate that the Fourteenth Amendment does not guarantee the right to litigate every relevant issue. Thus a summary writ of distress may issue against a customs collector to recover the amount found due upon a departmental audit of the collector's accounts, without any preliminary trial.[37] Again, the court will accept as conclusive the determination of the executive upon a political question, such as the date when California was conquered,[38] or the danger of foreign

[37] Murray *v.* Hoboken Land, etc. Co. 18 How. (U. S.) 272 (1855).

[38] United States *v.* Yorba, 1 Wall. (U. S.) 412 (1863); Hornsby *v.* United States, 10 Wall. (U. S.) 224 (1869).

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invasion,[39] or as to which of two rival state governments is the legal government,[40] even though the litigant was not party to the decision of the question. In the same way the court will not review the decision of the proper administrative officer that an alleged Chinese[41] or Japanese[42] person is not entitled to enter the United States. And where a discretion has been confided by law to an executive officer, his honest decision on questions of fact is final.[43] The effect given to decisions of the federal Land Office upon questions of fact is another example of the same principle.[44] In all these cases the decision might be right or might be wrong upon the merits, but it was held that the merits of the question could not be litigated, and that the decision was final. These cases, therefore, show that the right to try every relevant issue upon the merits is not necessarily an element either of due process or of equal protection of the laws. And since the Fourteenth Amendment does not guarantee freedom from judicial error to litigants in state courts,[45] it is sufficient if the court decides rightly or wrongly as to the existence and scope of the estoppel created by its own valid judgment or by the valid judgment of a court of a foreign country.

The cases then point to the following conclusions:

1. The Supreme Court of the United States has jurisdiction upon a writ of error to review a ruling by a state court as to the effect of a judgment of a federal court, or of a court of another state, of a territory, or of the District of Columbia, whether the error alleged be that too great or too little faith and credit was given to such judgment.

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[39] Martin *v.* Mott, 12 Wheat. (U. S.) 19 (1827).

[40] Luther *v.* Borden, 7 How. (U. S.) 1 (1849).

[41] United States *v.* Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1904).

[42] Nishimura Ekiu *v.* United States, 142 U. S. 651, 12 Sup. Ct. 336 (1892).

[43] Hadden *v.* Merritt, 115 U. S. 25, 5 Sup. Ct. 1169 (1885) (value of the Mexican dollar); Keim *v.* United States, 177 U. S. 290, 20 Sup. Ct. 574 (1900) (dismissal of subordinate for inefficiency); United States *v.* Johnston, 124 U. S. 236, 8 Sup. Ct. 446 (1888) (amount and propriety of the expenses of a special agent); United States *v.* Milwaukee, etc. Ry., 5 Biss. (U. S.) 410, 421 (1873) (as to whether a proposed bridge will obstruct navigation).

[44] Vance *v.* Burbank, 101 U. S. 514 (1879); Johnson *v.* Drew, 171 U. S. 93, 18 Sup. Ct. 800 (1898); Gertgens *v.* O'Connor, 191 U. S. 237, 24 Sup. Ct. 94 (1903).

[45] Bonner *v.* Gorman, 213 U. S. 86, 29 Sup. Ct. 483 (1909); Central Land Co. *v.* Laidley, 159 U. S. 103, 16 Sup. Ct. 80 (1895); Arrowsmith *v.* Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023 (1886). But on this point see an interesting article by Henry Schofield in 3 Ill. L. Rev. 195.

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2. The Supreme Court of the United States has jurisdiction to review and correct upon a writ of error a ruling by a state court that a judgment rendered in the same state or in a foreign country without jurisdiction binds and estops the appellant.

3. Assuming that a valid judgment binding upon the defendant has been rendered by a court of the state in which the judgment is drawn in question or of a foreign country, the Supreme Court of the United States has no jurisdiction to review the effect given thereto as an estoppel, whether the alleged error be that too great or too little effect as an estoppel has been given.

*Edwin H. Abbot, Jr.*

BOSTON, MASS.

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# HARVARD LAW REVIEW.

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CORRECTION. — Attention is called to an error in the February issue in the statement of the decision in the case of *Brainerd* v. *State*, 131 N. Y. Supp. 221 (Ct. of Claims). 25 HARV. L. REV. 388. A majority of the court held that costs should not be allowed.

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THE PATENTEE'S MONOPOLY AND THE ANTI-TRUST LAW. — How far does the Sherman Anti-Trust Act conflict with the monopoly granted to the inventor by the patent law?

The patent statute gives the right to exclude others from making, using, and vending the patented article.[1] But it gives nothing more.[2] It does not give the right to make, use, and vend, nor the property right in the patented chattel, nor the right to make contracts concerning it. These rights the patentee already has. The patented article itself, then, and contracts in reference to it are subject to the law of the land.[3] Thus it is subject to the police power of the state,[4] the law of public service,[5] and the criminal law.[6]

[1] U. S. COMP. STAT., 1901, § 4884, grants to the patentee "for the term of seventeen years the exclusive right to make, use, and vend the invention or discovery."

[2] See Bloomer *v.* McQuewan, 14 How. (U. S.) 539, 549.

[3] See Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 293.

[4] A patented oil must conform to the standard of safety prescribed by the state. Patterson *v.* Kentucky, 97 U. S. 501. A patentee of medicine must take out a state license to prescribe it as a physician. Jordan *v.* The Overseers of Dayton, 4 Oh. 294.

[5] That the telephone is patented is no excuse for refusing service. Chesapeake & Potomac Tel. Co. *v.* Baltimore & Ohio Tel. Co., 66 Md. 399, 7 Atl. 809.

[6] A state statute may prohibit the use of a patented lottery device. Vannini *v.* Paine, 1 Har. (Del.) 65.

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Edwin H Abbot Jr

# PATENTS AND THE SHERMAN ACT.

## I.

A patent is a true monopoly. It is granted under an Act of Congress.[1] The right conferred thereby is thus defined:

"The franchise which the patent grants consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. That is all that he obtains by the patent."[2]

But a grant of an exclusive privilege by the King or by the State is a monopoly in its strictest sense. A monopoly is thus defined by Sir Edward Coke:[3]

"A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindered in their lawfull trade."

This definition of monopoly in its technical sense has been quoted with approval by the Supreme Court of the United States.[4] Clearly a patent falls precisely within its terms.

The Sherman Act[5] prohibits restraints or monopolies of Interstate Commerce. The first two sections of that act are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *."

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

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[1] U. S. Comp. Stat. (1901) § 4884.

[2] Bloomer *v.* McQuewan (1852) 14 How. 539, 549; Continental Paper Bag Co. *v.* Eastern Paper Bag Co. (1908) 210 U. S. 405, 425.

[3] 3 Inst. 181, c. 85.

[4] United States *v.* E. C. Knight Co. (1895) 156 U. S. 1, 9; Standard Oil Co. *v.* U. S. (1911) 221 U. S. 1, 51.

[5] 26 Stat. 209.

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The Patent Act thus creates a monopoly while the Sherman Act prohibits monopolies. Moreover, the Sherman Act is the later enactment. But the two statutes are not in conflict. The first section of the Sherman Act extends to interstate commerce the common law rules as to restraint of trade.[6] The words "restraint of trade" are used in their technical and common law sense, not in their colloquial sense. The second section is intended to reach the evils caused by restraint of trade, whether these evils are produced by the acts prohibited by the first section, or in some other fashion.[7] Public policy, however, largely determines what is a "restraint of trade" in the common law sense. That which is expressly authorized by law does not violate the restrictions imposed by public policy. Patents are created by law. It follows that the franchise conferred by the patent is not diminished or restricted by the Sherman Act.[8] The patentee has under the Sherman Act the same right which he previously had to exclude others from making, using or vending the invention.[9]

Under the law as it now stands a patentee may suppress his invention during the life of the patent. Even though he does not use the invention himself he may restrain infringement by others.[10] But he may desire to use the invention himself or to license others to use it. Let us assume that he does so. Let us further assume that he or his licensees ship the patented article into other states. Such shipment is interstate commerce.[11] The first question is how far a patentee engaged in interstate commerce is subject to the Sherman Act.

## II.

A sharp distinction must be drawn between the right of the patentee to exclude others from making, using or vending the patented article, and the right of the patentee to make, use or vend it. The right to exclude others is the patent franchise. It is

[6]Standard Oil Co. *v.* U. S. (1911) 221 U. S. 1.

[7]*Ibid.* 61, 62.

[8]See Bement *v.* National Harrow Co. (1902) 186 U. S. 70; Henry *v.* A. B. Dick Co. (1912) 224 U. S. 1.

[9]Henry *v.* A. B. Dick Co. *supra.*

[10]Continental Paper Bag Co. *v.* Eastern Paper Bag Co. (1908) 210 U. S. 405.

[11]U. S. *v.* Addyston Pipe etc. Co. (1899) 175 U. S. 211; Montague *v.* Lowry (1904) 193 U. S. 38; Loewe *v.* Lawlor (1908) 208 U. S. 274; Rearick *v.* Pennsylvania (1906) 203 U. S. 507; International Text Book Co. *v.* Pigg (1910) 217 U. S. 91.

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granted under a statute which was passed under powers expressly conferred by the Constitution.[12] No state may destroy or abridge it. Even the far reaching police power of the states touches it but lightly.[13] The right of the patentee to make, use or vend the patented article is of wholly different character. It is not derived from the patent. The patentee had it before he took out the patent. He would still have it had he never patented the invention. He may make, use or vend the invention because any person has a right to employ his mind, body or property as he sees fit, subject only to the limitations imposed by law. The two rights are thus derived from different sources. The right of the patentee to exclude others is a special privilege conferred by statute. The right of the patentee to make, use or vend is derived from the general law, and is subject to regulation by that law. This distinction has far reaching effects upon the rights of the patentee under the Sherman Act.

The right of the patentee to make, use or vend the patented article is subject to the police power of the several states.[14] The patent confers no right to break state laws. A patentee who sells a patented illuminating oil[15] or patented oleomargarine[16] in violation of a state statute may be convicted and punished. The patentee of a patented medicine may not prescribe it without the license required of physicians by law.[17] The patentee of a lottery may not draw it in a state where lotteries are prohibited.[18] Patented articles are subject to state taxation, though the patent franchise is not.[19] If then patented articles when sold within a state are within the legislative jurisdiction of the states they cannot be beyond the reach of legislation by Congress when shipped into the several states. It follows that a *dictum* which in effect declares that patented articles, until released from the patent, are not within the scope of the Sherman Act[20] is unsound.

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[12]U. S. Const. Art. 1, § 8.

[13]Allen *v.* Riley (1906) 203 U. S. 347; Woods *v.* Carl (1906) 203 U. S. 358, holding that a state to prevent fraud may require the recording of certain papers in connection with the transfer of a patent.

[14]Opinion of the Justices (1907) 193 Mass. 605.

[15]Patterson *v.* Kentucky (1878) 97 U. S. 501.

[16]*In re* Brosnahan (1883) 18 Fed. 62.

[17]Jordan *v.* The Overseers of Dayton (1830) 4 Ohio 294.

[18]Vannini *v.* Paine (Del. 1833) 1 Harr. 65.

[19]Webber *v.* Virginia (1880) 103 U. S. 344.

[20]Baker, *J.*, in Rubber Fire Wheel Co. *v.* Milwaukee Rubber Co. (1907) 154 Fed. 358, 362.

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The right of the patentee to contract with respect to the patent is not conferred by the patent but by the general law. That law determines the validity of such contracts. Thus equity may refuse to enforce an unconscionable license agreement.[21] And a state may prohibit the owner of machinery from leasing the same upon condition that the lessee procure all similar machines from the lessor alone, even though the statute would apply to patented articles.[22] In the same way the holder of telephone patents may not insert in its licenses to a telephone company a condition that telephone service be not given to any telegraph company except the Western Union, since such a condition is in violation of the duty of a telephone company to serve all alike.[23] These cases show that license contracts are subject to the police power of the state and to the common law rule which governs public service companies. Were the right to permit others to use the invention derived from the patent franchise instead of from the general law, it would have overridden alike the common law and the statutes of the state.

The distinction between the right to exclude others from using the invention and the right to contract concerning the invention is well illustrated by the rule as to federal jurisdiction. It is well settled that the federal courts have exclusive jurisdiction by *reason of subject matter,* of actions based upon infringement of the patent franchise.[24] But the federal courts have no jurisdiction *by reason of subject matter* over actions to enforce,[25] or to set aside, license agreements[26] or to recover royalties thereunder.[27] This distinction rests upon the different source and nature of the two rights. Actions to redress infringement are based upon violation of the patent franchise. This franchise consists solely in the right to exclude others from making, using or vending the invention. It is derived from the Patent Act, and so confers federal jurisdiction.

[21]Pope Mfg. Co. *v.* Gormully (1892) 144 U. S. 224.

[22]Opinion of the Justices (1907) 193 Mass. 605.

[23]State *v.* Bell Telephone Co. (1885) 23 Fed. 539; State *v.* Delaware etc. Tel. Co. (1891) 47 Fed. 633, affirmed (1892) 50 Fed. 677; Chesapeake etc. Tel. Co. *v.* Baltimore etc. Tel. Co. (1886) 66 Md. 399.

[24]Henry *v.* A. B. Dick Co. (1911) 224 U. S. 1.

[25]Brown *v.* Shannon (1857) 20 How. 55; Hartell *v.* Tilghman (1878) 99 U. S. 547; Goodyear *v.* Union etc. Co. (1857) 4 Blatch. 63; Burr *v.* Gregory (1828) 2 Paine 426.

[26]Wilson *v.* Sandford (1850) 10 How. 99; Merserole *v.* Union etc. Co. (1869) 6 Blatch. 356.

[27]Allbright *v.* Teas (1882) 106 U. S. 613; Dale Tile Mfg. Co. *v.* Hyatt (1887) 125 U. S. 46; Blanchard *v.* Sprague (1859) 1 Cliff. 288.

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The right to grant licenses or otherwise to contract concerning the invention is derived from the general law. It is subject to the statute and common law of the several states. License contracts have precisely the same origin as contracts concerning unpatented articles. Actions upon license agreements present no federal question. This difference in jurisdiction emphasizes the different sources from which the patent franchise and the right to contract in respect of it are derived.

III.

The Sherman Act applies to patentees. They are not a class apart. It may be conceded that the Sherman Act did not diminish the extent of the patent franchise. But that franchise consists wholly in the right to exclude others from making, using or vending the patented invention. It confers no right to make, use or vend. It confers no right to contract with respect to the invention. Both the latter rights are derived from the general law. Both are subject to regulation by that law. The general law includes the federal statutes and the statute and common law of the several states. If the patentee ship the invention abroad or into the several states he engages in interstate commerce. If he engages in interstate commerce he subjects himself to the Sherman Act. His patent cannot remove him from the scope of that statute.

The Sherman Act is directed against "restraint of trade or commerce among the several states or with foreign nations." But the words "restraint of trade" were used in their common law, not their colloquial sense.[28] At common law everything which restrained trade was not necessarily a "restraint of trade." Incidental and indirect restraints did not offend against this rule of public policy.[29] Even a direct and sensible restraint was not necessarily bad. Thus one who sold out a business and its good will might covenant not to destroy that good will by competition. If the covenant was not of greater extent in space and time than was required under the circumstances it was valid.[30] But if the restraint was too extensive the covenant was void.[31] In a word

[28]Standard Oil Co. *v.* U. S. (1910) 221 U. S. 1.

[29]Hopkins *v.* U. S. (1898) 171 U. S. 578; Anderson *v.* U. S. (1898) 171 U. S. 604.

[30]Oregon Steam Nav. Co. *v.* Winsor (1873) 20 Wall 64; Cincinnati Packet Co. *v.* Bay (1906) 200 U. S. 179.

[31]Oregon Steam Nav. Co. *v.* Winsor *supra;* Shawnee Compress Co. *v.* Anderson (1908) 209 U. S. 423.

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what was a "restraint of trade" was a question of fact under all the circumstances of each case. And this rule was applied to interstate commerce by the Sherman Act.[32]

The rule above stated applies to a patentee. The question then is what acts by a patentee will amount to a "restraint of trade and commerce among the several states"? This is a question of fact under all the circumstances of the case. And a vital circumstance is the possession of the patent. True, the patent does not confer the sole right to make, use or vend. It only confers the right to exclude others from making, using or vending. But under and subject to the general law, irrespective of the patent, the patentee has a right to use his invention. His patent renders this right exclusive. Consequently, he has a monopoly which is born from a union of his franchise and his common law right. This monopoly will extend to interstate commerce if he engages therein. Such a monopoly, being created by law, does not violate the Sherman Act.[33]

It is now settled law that a patentee does not forfeit or diminish his patent franchise by suppressing his invention.[34] And none may use it without his consent. He thus has *power* to prescribe any condition which he sees fit as the price of user. This, however, does not mean that every condition which he chooses to prescribe is valid and legal. His right to prescribe conditions springs from his general right of contract. As has been shown this right is derived from the general law and is subject to that law.[35]

Yet certain peculiar privileges have been held to be incidental to the patent franchise. Thus the patentee may sell the patented article and prescribe a re-sale price,[36] though this right is denied to the holder of a copyright[37] and to the owner of a secret formula for compounding medicine.[38] He has also been allowed to license another to manufacture a patented harrow upon

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[32]Standard Oil Co. *v.* U. S. *supra.*

[33]See Bement *v.* National Harrow Co. (1902) 186 U. S. 70; Henry *v.* A. B. Dick Co. *supra.*

[34]Continental Paper Bag Co. *v.* Eastern Paper Bag Co. (1908) 210 U. S. 405.

[35]See ante § II. See also Henry *v.* A. B. Dick Co. *supra.*

[36]New Jersey Patent Co. *v.* Schaefer (1906) 144 Fed. 437; The Fair *v.* Dover Mfg. Co. (1908) 166 Fed. 117; Automatic Pencil Sharpener Co. *v.* Goldsmith (1911) 190 Fed. 205, 25 Harv. L. Rev. 454.

[37]Bobbs-Merril Co. *v.* Straus (1908) 210 U. S. 339.

[38]Dr. Miles Medical Co. *v.* Park & Sons. Co. (1911) 220 U. S. 373.

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condition that the licensee manufacture no other patented harrow,[39] though the restriction was upheld on the ground that it was intended to prevent infringement of other patents. He has even been permitted to grant a number of licenses to different licensees which restricted each licensee as to both price and territory[40] but this was on the ground that the patentee might sub-divide his monopoly as he saw fit.

A patentee, then, is not outside the scope of the Sherman Act. But since his monopoly is born of his patent franchise and his right under the general law, that monopoly does not infringe the act. Moreover he is not compelled by law to use his invention or to part with any portion of his monopoly. He may by contract sub-divide that monopoly even though such contracts would as to unpatented articles result in a forbidden restraint of trade. His monopoly is property which he may use as he uses other property. Yet he may not use his monopoly as a means to do what the law forbids. A patent is not an indulgence to violate the law.

## IV.

One final question remains to be considered. How far may a patentee add to his monopoly by agreement? Here, the direct cases are few and will be considered in detail.

In the first place it has been held that the patentee may not impose restrictions which extend beyond the life of the patent. In *Strait* v. *National Harrow Co.*,[41] the patentee exacted as the price of the license, agreements which in effect would have extended the patent fifty years. This agreement the court held was bad. It is true that the decision was by an inferior state tribunal, but the case was not appealed and it has been widely cited and approved.

Again, it has been held improper to grant a license under one patent on condition that the licensee will not attack other patents of the licensor. Such a condition would enable the owner of a single valid patent to sustain other patents of doubtful validity, and thereby greatly extend his monopoly. As Brown, *J.* said:

"* * * * * It is as important to the public that competi-

[39]Bement *v.* National Harrow Co. *supra.*

[40]Goshen Rubber Works *v.* Single Tube etc. Co. (1908) 166 Fed. 431. See also Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co. (1907) 154 Fed. 358; Bement *v.* National Harrow Co. *supra.*

[41](1891) 18 N. Y. Supp. 224.

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tion should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly. * * *"[42]

The next group of cases, known as the *National Harrow Cases,* involve the right of different patentees who might otherwise compete, to assign their respective patents to a holding company in order to stifle such competition. In each of the cases it appeared that the National Harrow Co. was organized to acquire and hold all the patents for float spring tooth harrows held by various corporations and firms throughout the United States, and then to grant licenses to such corporations and firms by which the selling price of the harrows was fixed and competition therein eliminated.

The question first arose in *National Harrow Co.* v. *Quick* upon a bill by the Harrow Co. to restrain infringement of certain letters patent, and District Judge Baker, in holding the combination illegal said:

"It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations, composed of numerous corporations and firms. * * *"[43]

The question again arose in *National Harrow Co.* v. *Hench,* where Circuit Judge Acheson, in reaching the same result, said:

"* * * * * * It is true that a patentee has the exclusive control of his invention during the life of the patent. He may practice the invention or not, as he sees fit, and he may grant to others licenses upon his own terms. But where, as was the case here, a large number of independent manufacturing concerns are engaged in making and selling under different patents and in various forms, an extensively used article, competition between them is the natural and inevitable result, and thereby the public interest is promoted. Therefore, a combination between such manufacturers, which imposes a widespread restraint upon the trade, and destroys competition, is as injurious to the community, and as obnoxious to sound public policy, as if the confederates were dealing in unpatented articles. * * * To sanction such a result, because accomplished by a combination of patentees, would be, I think, to pervert the patent laws. * * *"[44]

The Harrow Co. appealed to the Circuit Court of Appeals for the Third Circuit where the court in affirming the decision said:

[42]Pope Mfg. Co. *v.* Gormully (1892) 144 U. S. 224, 234.

[43](1895) 67 Fed. 130. 131. The case was affirmed upon the ground that the patent in question was void for want of invention. (1896) 74 Fed. 236.

[44](1896) 76 Fed. 667, 669.

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"* * * * * * * The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. * * *"[45]

It has sometimes been urged that these cases are modified or overruled by *Bement* v. *National Harrow Co.* In that case the National Harrow Co. brought action in the courts of New York to restrain violation of two license agreements (spoken of in the opinion as A & B) and to recover damages. These agreements licensed the plaintiff to manufacture harrows under a certain patent at a royalty of one dollar per harrow. The plaintiff agreed to defend suits for infringement and made it a condition of the license that the harrow should be sold at a certain price and that the defendant should not make other patented harrows. The defendant alleged in the answer that the plaintiff was an illegal combination, but the referee to whom the case was referred did not find this to be the fact and gave judgment for the plaintiff. The report of the referee was eventually affirmed by the Court of Appeals, and the case was brought, upon the question of illegal combination, before the Supreme Court of the United States. That court held that the facts which appeared in the referee's report were insufficient to show a combination and affirmed the judgment. That this was all that was decided appears by the following quotations:

"* * * The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The con-

[45] (1897) 83 Fed. 36, 38. This case was followed though without extended argument in National Harrow Co. *v.* Hench (1898) 84 Fed. 266; Bement *v.* National Harrow Co. *supra.*

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tracts A and B are to be judged by their own contents alone and construed accordingly."

* * * * * * * *

"* * * As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. * * * *"[46]

It may be observed that the conditions imposed by the license in *Bement* v. *National Harrow Co.* were not of far reaching character. The license was a license to manufacture under the patent. The restriction as to sale price, therefore, was not a restriction attached to a chattel upon its transfer but a restriction by the owner of the patent upon the production of the patented article.[47] It does not appear from the case that this condition was to be re-imposed upon the purchaser from the licensee. And even if the restriction had been attached to the patented article, as a considerable body of federal authority allows,[48] it would merely have sub-divided the patentee's monopoly. Nor can the condition against making other patented harrows be deemed oppressive in this instance. The license fee was one dollar a harrow. The licensor's return was directly in proportion to the number of harrows made and sold. Such a restriction would bring about the fullest exploitation of the invention by confining the licensee's energies to one channel. Moreover, the licensor was bound to defend the licensee against infringement suits. If the licensee were allowed to deal in other patented harrows infringement litigation might easily spring up. This consideration had great weight with the court, which by construction considerably narrowed this condition. It may thus be said that the conditions imposed had an honest relation to the subject matter of the agreement. They may be supported upon the same principles which sustain reasonable covenants by a vendor of business not to compete with his vendee.

In view of the restricted nature of the decision in *Bement* v. *National Harrow Co.* the correctness of *United States* v. *Consolidated Raisin Co.* v. *Griffin & Skelley Co.*[49] is open to serious

[46](1902) 186 U. S. 70, 85, 95.

[47]The owner of a secret though unpatented formula for compounding medicine may impose considerable restrictions upon one whom he licenses to use it. Fowle *v.* Park (1889) 131 U. S. 88, though he may not attach a resale restriction to the medicine itself. Dr. Miles Medicine Co. *v.* Park & Sons Co. (1911) 220 U. S. 373; Park & Sons Co. *v.* Hartman (1907) 153 Fed. 24; *Contra,* Garst *v.* Harris (1900) 177 Mass. 72.

[48]See note 36.

[49](1903) 126 Fed. 364.

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question. In that case there was a combination of all the raisin seeding patents quite similar to the combination in the *National Harrow Cases.* The court first declared that the *Bement Case* had held that such a combination was proper (a manifest error!) and then followed that conception of the *Bement Case* as binding authority. The error of the court with respect to the *Bement Case* has been noticed in a later case,[50] and the doctrine therein laid down has not been followed in two subsequent decisions in other circuits.[51]

The principle laid down in the *National Harrow Cases* is followed in *Blount Mfg. Co.* v. *Yale and Towne Mfg. Co.*[52] In that case three companies which controlled between them all the patents upon liquid door checks entered into a tripartite arrangement by which the business was pooled for the common benefit. The Blount Company sought an accounting under this arrangement. The defendant demurred upon the ground that the agreement was illegal under the Sherman Act. The plaintiff relied upon the patents to sustain the agreement. In sustaining the demurrer Brown, *J.* said:

"Combinations between owners of independent patents, whereby, as part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent. As by the terms of the contracts under consideration the owners of distinct patents each agreed to restrain its own interstate trade, I am of the opinion that the contracts are in these particulars obnoxious to the Sherman Anti-trust Act."[53]

Another case which enforces the same principle is *United States* v. *Standard Sanitary Mfg. Co.* In that case the United States brought a bill in equity under the Sherman Act to dissolve the defendant as an illegal combination. The proof showed that one Wayman, who had a patent upon a certain tool used to glaze sanitary ware, licensed some sixteen manufacturers in different states to use such tool in consideration of a separate agreement

[50]Indiana Mfg. Co. *v.* J. I. Case etc. Co. (1906) 148 Fed. 21, reversed upon another point in 154 Fed. 365; see also Standard Sanitary Mfg. Co. *v.* United States, U. S. Sup. Ct. November 18th, 1912.

[51]Blount Mfg. Co. *v.* Yale & Towne Mfg. Co. (1909) 166 Fed. 555; U. S. *v.* Standard Sanitary Mfg. Co. (1911) 191 Fed. 172.

[52](1909) 166 Fed. 555, 562.

[53]Agreements of a somewhat similar character by non-patentees had been held improper in U. S. *v.* Addyston Pipe etc. Co. (1899) 175 U. S. 211 and Montague *v.* Lowry (1904) 193 U. S. 38.

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by each manufacturer to sell the ware at certain prices and only to certain designated jobbers. Each of the designated jobbers in turn executed a separate agreement not to buy except from the sixteen manufacturers and not to sell below certain prices. The defendants contended that the combination was rendered lawful by the licenses from Wayman. In overruling this contention Rose, *J.* said:

"* * * A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from making, selling or using his invention, for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law. He breaks it precisely as the individual defendants in the Standard Oil and American Tobacco Companies broke it. They had the same right to use their brains, their capital, and their credit as they thought best, as he had to use his right to exclude all others from making, using or selling automatic dredges. He was subject to the same limitations as they were. They could not lawfully use their brains, their money, and their credit to restrain trade in petroleum and tobacco. He cannot use his patent rights to restrain trade in unpatented bathtubs."[54]

A somewhat similar question arose in *Vulcan Powder Co.* v. *Hercules Powder Co.* There the plaintiff brought action upon a tripartite agreement by which the plaintiff, the defendant and another powder company pooled their business. The defendant demurred upon the ground that the agreement was illegal under the California anti-trust statute. The plaintiff contended that the statute did not apply because some of the explosives were patented. In sustaining the demurrer McFarland, *J.*, said:

"* * * But no case has been cited in which it has been held that several persons or companies can legally enter into a business combination to control the manufacture, or sale, or price of a staple of commerce merely because some of the contracting parties have letters patent for certain grades of that staple. * * *"[55]

Again in *State* v. *Creamery Package Co.* the State of Minnesota brought action to forfeit the license of the defendant to do business in the State upon the ground that the defendant had become party to an agreement in restraint of trade. The proof showed that the Package Company had absorbed its competitors

[54](1911) 191 Fed. 172, 190. Affirmed by the United States Supreme Court, November 18th, 1912, *sub nom.* Standard Sanitary Mfg. Co. *v.* United States. The opinion was handed down too late to be considered at length in this article.

[55](1892) 96 Cal. 510, 516.

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in the manufacture of creamery supplies by exchanging its stock for their stock. These supplies were covered by patents. In granting the relief prayed for, O'Brien, *J.*, said:

"There can be no question that the holder of a duly issued patent has a lawful monopoly in its use, and he violates no public policy in protecting his monopoly to the fullest extent. But it does not follow from this that the patentee acquires the right by combining with other patentees to extend the monopoly granted to each, and thus abuse the privilege conferred upon him by the government. * * *"[56]

In *United Shoe Machinery Co.* v. *La Chapelle* the defendant, an inventor of shoe machinery, in consideration of employment by the plaintiff, agreed to assign to the plaintiff all inventions which he might make while so employed and for ten years thereafter. After the employment ceased he obtained a patent for an improvement in shoe machinery. The company thereupon brought a bill in equity to compel him to assign it, pursuant to the contract. The answer alleged facts tending to show that the plaintiff was a combination in restraint of trade in violation of the Sherman Act, and that the contract sued on was made in aid of the unlawful scheme. The trial judge ruled that this defense was not open. In sustaining the defendant's exception to this ruling, Rugg, *C. J.*, said:

"* * * No word or phrase in the Sherman anti-trust act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combination. We are unable to perceive any underlying reason for supposing that by implication growing out of economics or business conditions such as exemption was intended. There appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of the statute to one and not to the other. The conclusion seems to follow that the comprehensive condemnation of the act against every person who monopolizes interstate commence by combination with others includes holders of patents as well as others."[57]

Yet every agreement by which a patentee extends the scope of his monopoly is not invalid. This is shown by two lines of cases which must now be considered.

In the first place a patentee may to some extent buy up other similar patents. In *Indiana Mfg. Co.* v. *J. I. Case etc. Co.*[58] the

[56](1910) 110 Minn. 415.
[57](Mass. 1912) 99 N. E. 289, 292.
[58](1909) 154 Fed. 365.

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owner of the pioneer and dominant patent on pneumatic straw stackers bought in five other subsidiary pneumatic straw stacker patents and then issued licenses to substantially all the threshing machine manufacturers of the country. One of the licensees disregarded the terms of his license and the plaintiff brought action to restrain such infringement. The defendant alleged in defense that the plaintiff was an illegal combination. The judgment below was for the defendant.[59] The Court of Appeals reversed the decision, holding that under the circumstances neither the number of patents held by nor the number of licenses issued by the plaintiff constituted a violation of the act. The majority opinion expressly declared that the plaintiff might buy up even competing patents. Judge Grosscup, however, concurred in the result upon the ground that the additional patents were simply for improvements upon the dominant patent already owned by the plaintiff. All that the case actually decided is that a patentee may buy in patents for improvements even though his original patent is thereby in effect extended. The latter proposition has already been approved by the Supreme Court.[60] The question as to how far a patentee may monopolize the whole filed by acquiring competing patents seems to be still open. The weight of present authority, however, is that it is improper to create the monopoly either by agreement between the patentees,[61] or by conveying the patents to a holding company.[62]

The other line of cases has just been approved by *Henry* v. *A. B. Dick Co.*[63] In that case the patentee of a mimeograph licensed the use of it only with ink manufactured by the patentee. A notice of this restriction was attached to the machine itself. A purchaser bought ink from the defendant against whom the plaintiff filed a bill for contributory infringement. The ink was unpatented. The court held the restriction valid and granted the relief prayed for.

Here, it will be observed, the patentee is allowed to extend, by agreement, his patent monopoly to an unpatented article used

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[59](1906) 148 Fed. 21.

[60]U. S. *v.* Bell Tel. Co. (1897) 167 U. S. 224.

[61]Blount Mfg. Co. *v.* Yale & Towne Mfg. Co. (1909) 166 Fed. 555; Vulcan Powder Co. *v.* Hercules Powder Co. (1892) 96 Cal. 510.

[62]National Harrow Cases, see notes 43-45; State *v.* Creamery Package Co. (1910) 110 Minn. 415; United Shoe Machinery Co. *v.* LaChapelle (Mass. 1912) 99 N. E. 289.

[63](1911) 224 U. S. 1. Day, *J.* was absent and no successor had been appointed to Harlan, *J.* who died before the decision was announced.

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in connection with the patented article. The decision was by four judges to three. The majority opinion was by Mr. Justice Lurton, who was already committed to this doctrine by *Heaton-Peninsula Button Fastener Co.* v. *Eureka Specialty Co.*[64] The concurring justices were McKenna, *J.*, Holmes, *J.*, who in *Garst* v. *Harris*[65] held that the proprietor of a secret medicinal formula might attach to the medicine a condition as to resale price,[66] and Van Devanter, *J.*, who in *National Phonograph* v. *Schlegel*[67] gave his adherence to the doctrine of the *Button Fastener Case*. The dissenting Justices were White, *C. J.*, Hughes and Lamar, *J. J.* The case, however, affirms the proposition already laid down in the *Button Fastener Case*,[68] that contracts made by a patentee respecting the use of the invention are subject to the general law and the rules of public policy. Under this rule the contracts of the patentee are, of course, subject to the Sherman Act. All that this case decides is that a patentee may, as a condition of his license, require that the user of the patented article buy supplies therefor from him.[69] Whether the principle will be further extended remains to be decided.

There remains then a debatable land in which the right of the patentee is as yet uncertain. On the one hand he may to some extent extend his monopoly by acquiring additional patents and by reserving to himself the right to furnish supplies for use with the patented article. On the other hand, by the weight of authority, he may not stifle competition between different patents either by contract or by concentrating the patents in the hands of a holding company. Somewhere between these two points the boundary of his right appears to lie. It may be that *Henry* v. *A. B. Dick Co.*, marks its utmost limit. It is to be hoped that this uncertainty may be dispelled in the near future by further decisions or by legislation.

EDWIN H. ABBOT, JR.

BOSTON.

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[64] (1896) 77 Fed. 288.

[65] (1900) 177 Mass. 72.

[66] The Supreme Court, Holmes, *J.* dissenting, held the contrary in Dr. Miles Medical Co. *v.* Park & Sons Co. (1911) 220 U. S. 373.

[67] (1904) 128 Fed. 733.

[68] (1896) 77 Fed. 288, 292, 293.

[69] For a further discussion of this case see 12 COLUMBIA LAW REVIEW 445; 25 Harvard Law Review 641.

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# NOTES.

EXEMPTION FROM TAXATION AS PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.—Prior to the adoption of the Fourteenth Amendment, the only refuge which the federal Constitution offered to litigants seeking to protect tax exemptions from violation by State legislatures, lay in the "contract clause."[1] The Supreme Court early extended this provision to embrace legislative grants,[2] including, among others, grants of exemption from taxation, provided they were made upon good consideration.[3] When this was lacking, the grant was held to be a bounty, a mere gratuity, which might be abolished at the pleas-

[1]Property rights were then unprotected against State action so far as the federal Constitution was concerned, unless they were rights arising out of contract, see Railroad *v.* Nesbit (U. S. 1850) 10 How. 395; for as such they came within the scope of the "contract clause."

[2]Fletcher *v.* Peck (1810) 6 Cranch 87.

[3]Tucker *v.* Ferguson (1874) 22 Wall. 527; R. R. *v.* Supervisors (1876) 93 U. S. 595.

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Edwin H. Abbot Jr

# NOTICE TO A CORPORATION FROM ENTRIES ON ITS BOOKS.

SUPPOSE that the books of a corporation kept in the usual course of its business record certain facts. Suppose further that an officer of the corporation, acting on its behalf within the scope of his powers but personally ignorant of the facts so recorded, makes a contract with respect to which those facts are material. Is the corporation charged with notice of those facts? The question may be put in concrete form. Assume that the books of a corporation disclose that a certain negotiable note is held by A. in trust for B. A. brings the note before maturity to an officer of the corporation who is personally ignorant of the trust. This officer discounts the note on behalf of the corporation and applies the proceeds to reduce the personal overdrafts of A. Is the corporation a *bonâ fide* purchaser of the note or does it hold the note subject to the trust? In a word, is a corporation charged with notice of the facts which are recorded upon its books in the usual course of its business even though the officer who acts on its behalf is ignorant of them?

Our problem divides into three parts. First, can a corporation have knowledge or notice? Second, how can a corporation receive knowledge or notice? Third, if a corporation have knowledge or notice is it material that the officer who acts on its behalf has no personal knowledge of the matter in question?

## I.

A distinction is sometimes made between actual knowledge or notice and constructive notice. Actual knowledge or notice involves conscious perception of a fact. It is the result of the operation of mind upon the impressions received through the senses. Constructive notice is a legal inference drawn from an opportunity to know which the law presumes that the individual has utilized. Thus the law ordinarily presumes that an agent has disclosed to his principal whatever pertinent information the agent possesses with

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respect to the matters in which he acts as such agent.[1] It is said, therefore, that the knowledge of the agent as to matters in which he acts for the principal is notice to the principal, even though no disclosure has in fact been made.[2] Again, the recording-acts frequently make the records made thereunder constructive notice of the facts recorded even though these records have not been examined. In some states the rule obtains that one who receives a document and has opportunity to read it, is charged with constructive notice of its contents even though the document be in fact unread.[3] It has also been held that open and unequivocal possession of land is constructive notice of the interest of the possessor therein.[4] In a word, constructive notice is merely evidence of knowledge of so violent a character that the law will not permit it to be controverted.[5] In many instances, therefore, constructive notice is a substitute for and legally equivalent to actual knowledge.

Can a corporation have actual knowledge? It is a legal entity. It has no physical existence nor outward embodiment. It has no mind. It has only representatives. In certain aspects it is represented by the stockholders, yet the stockholders are not the corporation. The corporation can neither think, feel, nor perceive. It follows that this incorporeal legal entity cannot receive or possess actual knowledge.

But a corporation does business as individuals do. It can contract though it actually possesses no mind to meet the mind of the other party. It can conspire as if it possessed a physical brain.[6] It would be most unjust if it could escape the liabilities imposed by knowledge of facts because it possesses no physical intelligence

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[1] Suit *v.* Woodhall, 113 Mass. 391, 395 (1873); Bank of the United States *v.* Davis, 2 Hill (N. Y.) 451, 464 (1842); The Distilled Spirits, 11 Wall. (U. S.) 356, 367 (1870); Stanley *v.* Schwalby, 162 U. S. 255, 276 (1896); Cole *v.* Getzinger, 96 Wis. 559, 576, 71 N. W. 75, 80 (1897).

[2] See cases cited in note 1.

[3] Hoadley *v.* Northern Transportation Co., 115 Mass. 304 (1874); Bostwick *v.* Mutual Life Ins. Co., 116 Wis. 392, 92 N. W. 246 (1903); Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506 (1813).

[4] Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417 (1892).

[5] See Townsend *v.* Little, 109 U. S. 504, 511 (1883); Shauer *v.* Alterton, 151 U. S. 607 (1894).

[6] United States *v.* MacAndrews & Forbes Co., 149 Fed. 823 (C. C., S. D. N. Y., 1906).

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and is incapable of those intellectual processes which result in knowledge in the individual. Corporations, it is true, can act only through their officers, directors, attorneys, servants, and agents. But even in the case of a human principal it is settled law that knowledge as to matters within the scope of the agency possessed by an agent who acts for his principal is notice to the principal, even though the agent in fact make no disclosure.[7] Indeed constructive notice to the agent is constructive notice to the principal.[8] This doctrine of constructive notice has been extended in its fullest application to corporations. True, the officer, director, servant, or agent cannot make disclosure to the corporate entity. But, in so far as he represents the corporation and acts for it, knowledge or notice possessed by him as to matters within the scope of his authority is as matter of law notice to the corporation.[9] As to corporations, then, constructive notice is a substitute for and legally equivalent to actual or constructive knowledge in a human being.

## II.

It has been necessary to consider these somewhat elementary matters in order to determine the effect of corporate records as notice to the corporation. Generally speaking, corporate records are of two kinds. First come the records of corporate action by the stockholders, board of directors, executive committee, and the like. These generally consist of votes or resolutions, or minutes of business transacted at the meetings. The second species of corporate record is its business books and incidental records, such as its journal, cash-book, ledger, check-books, and files of letters. These also record corporate action, though usually action of a less solemn character than the votes or resolutions passed at corporate meetings. Corporate books, then, whether minute books or account books, record corporate action. They differ in degree with the power of the corporate agents whose actions they record.

It seems curious that there is little, if any, authority upon the

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[7] *Ante*, note 1.

[8] Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417 (1892).

[9] Manhattan Bank *v.* Walker, 130 U. S. 267 (1889); National Security Bank *v.* Cushman, 121 Mass. 490 (1877); Trapp *v.* Fidelity National Bank, 101 Ky. 485, 41 S. W. 577 (1897); Twenty-Sixth Ward Bank *v.* Stearns, 148 N. Y. 515, 42 N. E. 1050 (1896).

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effect of corporate minute books as notice to the corporation. The writer has been unable to find any case which directly passes on this question. On principle, however, the result seems clear. The minute books record action on behalf of the corporation by its stockholders, directors, executive committee, or the like. Here we have every element necessary to affect a human principal with constructive notice through his agent. The action is on behalf of the corporation. Generally it is not in excess of the authority possessed by those who act. The information recorded is present to the minds of those who act, as the record shows. These are precisely the requisites of notice to a principal through his agent.[10] There seems little doubt that the same rule will be applied to a corporation as to a human principal.

The argumentative authority looks the same way. Thus knowledge possessed by a director who does not act on behalf of the corporation does not affect the corporation.[11] But if a director meets and acts with the board, the corporation is charged with the knowledge which he possesses as to the matter in hand even though he does not disclose it.[12] If information possessed by a director becomes notice to the corporation when he acts with the board even though it remains locked in his own breast, how much more effective must be information which is disclosed and spread upon the records? Moreover, these very records are the best evidence of the matters properly recorded. Duly identified, they are admissible even between third parties.[13] Evidently a corporation cannot escape notice of its own corporate acts. It seems to follow that its own records, which are the best evidence of what was done, must be notice to it of that which is properly recorded.

Perhaps some question might arise as to a record of acts purporting to be in behalf of the corporation but in excess of its cor-

[10] The Distilled Spirits, 11 Wall. (U. S.) 356 (1870).

[11] Fulton Bank *v.* Canal Co., 4 Paige (N. Y.) 127 (1833); Atlantic State Bank *v.* Savery, 82 N. Y. 291 (1880); Casco National Bank *v.* Clark, 139 N. Y. 307, 34 N. E. 908 (1893); First National Bank *v.* Christopher, 40 N. J. L. 435 (1878); Innerarity v. Merchants' Bank, 139 Mass. 332, 1 N. E. 282 (1885).

[12] Bank of the United States *v.* Davis, 2 Hill (N. Y.) 451 (1842); Twenty-Sixth Ward Bank *v.* Stearns, 148 N. Y. 515, 42 N. E. 1050 (1896); National Security Bank *v.* Cushman, 121 Mass. 490 (1877); Beacon Trust Co. *v.* Souther, 183 Mass. 413, 67 N. E. 345 (1903); Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394 (1843).

[13] Blake *v.* Griswold, 103 N. Y. 429, 9 N. E. 434 (1886); Howard Ins. Co. *v.* Hope, etc. Ins. Co., 22 Conn. 394 (1853); Hudson *v.* Carman, 41 Me. 84 (1856).

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porate powers. At one time some courts took the view that a corporation was unable to act in excess of the powers conferred upon it. But this view is now generally exploded. True, the courts will not, as a general rule, aid either party to enforce an executory agreement in excess of the corporate powers. Yet they will usually decline to undo an executed transaction on the ground that it was beyond the powers of the corporation.[14] Indeed an executed *ultra vires* act may be the foundation of corporate rights and liabilities.[14] It follows that an act in excess of the corporate powers is still a corporate act, though an improper one. But such an act, if transacted at a corporate meeting, should appear in the records. It is the duty of the recording officer to keep a true record, and if such act were not recorded the record would be untrue. Yet if a corporation can sin, and it is the duty of the recording officer to record the acts of the meeting truly whether they be proper or *ultra vires*, it would be most inequitable to hold that only the records of good deeds are notice to the corporation. It would put a premium upon *ultra vires* transactions. Consequently whatever is properly recorded should be notice to the corporation whether the matter recorded be within or outside the corporate powers.

## III.

We turn now to the effect of entries in the usual course of business upon the less formal books of the corporation, such as the journal, cash-book, ledger, and the like. Such entries are usually made by servants of the corporation having small powers and limited discretion. Yet the humblest servant of a corporation may be a conduit of information and affect the corporation with notice. If the knowledge possessed by the servant and present to his mind[15] be pertinent to matters within the scope of the servant's employment and concern matters as to which he acts on behalf of the corporation, such knowledge becomes the knowledge of the corporation. Thus where it was part of the duty of a cleaner of

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[14] Executed Ultra Vires Transactions, by Edward H. Warren, 23 HARV. L. REV. 496.

[15] The Distilled Spirits, 11 Wall. (U. S.) 356, 367 (1870) *semble*; Constant *v.* University of Rochester, 111 N. Y. 604, 19 N. E. 631 (1889). But the evidence that the transaction was present to the agent's mind need not be strong, and such knowledge may be inferred from the circumstances. Holden *v.* New York & Erie Bank, 72 N. Y. 286 (1878).

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electric lights to note and report defects, and the cleaner in the exercise of his service observed that a pole was defective but failed to report, the corporation was nevertheless charged with his knowledge.[16] Again, a notice as to matters within the scope of his employment given to a bookkeeper,[17] local insurance agent,[18] general claim agent,[19] paying teller,[20] or receiving teller [21] has been held to be notice to the principal. On the other hand, a notice of the dissolution of a partnership given to a drummer whose duty did not extend beyond receiving and transmitting orders is knowledge beyond the scope of the drummer's employment and so not notice to his principal.[22] But book entries made in the usual course of business fall within the strictest limits of the general rule. They are made by a servant acting within the scope of his employment and in the exercise of his service. On principle, therefore, such entries should be notice of the matters entered. Here also the direct authority is singularly scanty. The writer has found only three cases which directly deal with the question.

In Brady *v.* North Jersey Street Ry. Co.[23] a motorman brought action to recover for injuries caused by a defective car. The defendant company kept a book in which it was the duty of each motorman to enter the condition of his car at the close of the run. The plaintiff was permitted to prove an entry as to the car in question by another motorman in these terms: "bad hand brake, sand box out of order." On appeal the judgment for the plaintiff was reversed [24] on the ground that there was no admissible evidence of the defective condition of the car. In regard to the effect of this entry, Bergen, J., said:

"That this evidence would have some weight in determining the question whether the defendant had notice of the defective condition of the

[16] City of Denver *v.* Sherret, 88 Fed. 226 (C. C. A., Eighth Circ., 1902).

[17] Dillon *v.* Anderson, 43 N. Y. 231 (1870).

[18] Dick *v.* Equitable Fire, etc. Ins. Co., 92 Wis. 47, 65 N. W. 742 (1896).

[19] Atkinson *v.* Chicago & N. W. Ry., 93 Wis. 362, 67 N. W. 703 (1896).

[20] Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532 (1858); Skinner *v.* Merchants' Bank, 4 Allen (Mass.) 290 (1862).

[21] First National Bank *v.* Fourth National Bank, 56 Fed. 967 (C. C. A., Sixth Circ., 1893).

[22] Neal *v.* M. E. Smith & Co., 116 Fed. 20 (C. C. A., Eighth Circ., 1902).

[23] 76 N. J. L. 744, 71 Atl. 238 (1908), headnote inadequate.

[24] The verdict for the plaintiff was set aside by the Supreme Court (74 N. J. L. 413), and this action was affirmed by the Court of Errors and Appeals.

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car, if it was defective, cannot be disputed. The condition of the car cannot be established by such entry, and its use must be confined to the question whether defendant had notice of a condition shown to exist, and cannot be accepted as primary proof of the condition it states."

In New England Car-Spring Co. *v.* Union India Rubber Co.[25] the right of the plaintiff depended on the assent of the defendant to the grant of certain patent rights. The grantor had given $1000, one-fourth of the purchase price received from the plaintiff, to the treasurer of the defendant in accordance with a prior agreement. The receipt of this amount was entered upon the books of the company. For the defendant it was argued that the entries on the books were not such notice that the retention of the $1000 constituted an assent. The court ruled that the entries on the books of the corporation constituted notice to it so that the retention of the $1000 was an assent to the sale. Ingersoll, J., said:

"It appears on the books of the corporation that a draft, drawn by Charles Ely on Edward Crane, for $1000 was received, and that the 'patent account' was credited with that draft. . . . The entry on the books fully apprised the corporation that the $1000 draft was paid and received on the 'patent account.' It also apprised the directors. By inquiry the directors could have ascertained for what particular reason the $1000 draft was credited to 'the patent account.' It was the duty of the corporation, through its agents, the directors, to make such inquiry. It is to be presumed that the directors performed this duty. . . . If the directors, by a neglect of their duty, were ignorant of this entry on the books, and of the purpose for which the draft was received, the corporation cannot set up such neglect of duty in its agents, to show that it had no knowledge of the transaction as it actually was."

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[25] 4 Blatchf. 1 (C. C., Second Circ., 1857), headnote inadequate. In more detail the facts were these: In 1844 Goodyear, the patentee, gave to the defendant an exclusive license covering the whole right granted by the patent. He, however, reserved to himself the privilege of selling for a sum in gross the exclusive right for any particular subject of manufacture, provided that such right should first be offered to the defendant at the same price and such offer remain unaccepted by the defendant for sixty days. If the defendant should not accept the offer, one-fourth of such purchase price was to be paid to it before the right was transferred to the purchaser. In 1847 Goodyear sold to Charles Ely and Edward Crane for $4000 the exclusive right to use his invention in the manufacture of car springs. Before the sale he orally offered this right at that price to the treasurer of the defendant. The offer was not accepted within the sixty days. Before the transfer to Ely and Crane, Goodyear gave to the treasurer of the defendant a draft for $1000, which was cashed and the proceeds entered on the

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In Allen *v.* Puritan Trust Co.[26] the proof showed that one Baker had two accounts with the defendant trust company. The first was his personal account. The other was entered upon the books as "Estate of Albert H. Bird, William L. Baker, administrator." On four different occasions Baker's personal account became overdrawn. He then drew checks upon the "Estate" account, which the defendant accepted in payment of the overdraft. After Baker's death the new administrator *de bonis non* of Albert H. Bird brought suit to recover the amount of these checks. A master found for the plaintiff. In affirming this decree the court said, through Braley, J.:

"The personal property of the estate was held by him [Baker] in a fiduciary capacity, and the nature of the respective accounts was fully disclosed by the contract. And in the discharge of their several duties, which were fully detailed by the master, the officers and agents of the defendant [trust company] were charged with knowledge of the scope and effect of the various entries relating to the deposit and shown on the defendant's books."

These two latter cases, then, hold that a corporation is charged with notice of entries made upon its books in the usual course of business. It is also said that the agents of the corporation in acting for it are charged with knowledge of such entries. It seems unnecessary, however, to impute such knowledge to the agents. The act of such agents on behalf of the corporation is the act of the corporation itself.[27] The corporation itself has notice of the facts in question from its own books, through the agents who made the entries. The situation then is that a principal who knows the facts acts through an agent who is ignorant. But if the principal knows the facts that should be sufficient. The better view would seem to be that the corporation is directly affected with notice of the entries on its own books, rather than that such notice is constructively dragged into the ignorant agent in order that his constructive knowledge may become the constructive knowledge of

books. Crane and Ely assigned their right to the plaintiff. The court granted a provisional injunction to refrain infringement of the patent by the defendant.

[26] 211 Mass. 409, 97 N. E. 916 (1912).

[27] American Fur Co. *v.* United States, 2 Pet. (U. S.) 358, 364 (1829); Clicquot's Champagne, 3 Wall. (U. S.) 114, 140 (1865); Stockwell *v.* United States, 13 Wall. (U. S.) 531, 550 (1871).

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his principal. The absurdity of charging the corporation with knowledge indirectly through the ignorant agents instead of directly through the entries is shown by those cases which hold that even directors are not personally chargeable as matter of law with knowledge of that which appears upon the corporate books.[28]

Another line of cases argumentatively supports the view that a corporation as matter of law has notice of those entries made upon its books in the usual course of business. Such books or entries are competent against the corporation as an admission by it. Thus a schedule,[29] annual report,[30] report of superintendent to directors,[31] train sheet,[32] account on the corporate books,[33] and deposit envelope [34] have all been held competent as admissions by the corporation. But if the nature of the entry were not known to the corporation, the entry itself would scarcely constitute an admission by the corporation. Moreover, these cases further support the view that the making of an entry upon the books of a corporation in the usual course of business is a corporate act. A corporation can scarcely be held to be ignorant of the things which it does as a corporation.

Yet it does not follow that everything which appears upon the books of a corporation is an admission by it or notice to it. It is familiar law that the knowledge of an agent engaged in defrauding his principal is not notice to the principal.[35] The presumption

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[28] Briggs *v.* Spaulding, 141 U. S. 132 (1890); Wakeman *v.* Dalley, 51 N. Y. 27 (1872); Hallmark's Case, 9 Ch. D. 329 (1878). But it is the personal duty of directors to use reasonable diligence to ascertain the facts as to the corporation and its business. Martin *v.* Webb, 110 U. S. 7 (1883).

[29] Clicquot's Champagne, 3 Wall. (U. S.) 114 (1865).

[30] Bailey *v.* Railroad, 22 Wall. (U. S.) 604 (1874).

[31] Vicksburg, etc. R. Co. *v.* Putnam, 118 U. S. 545 (1886); Le Abra, etc. Mining Co. *v.* United States, 175 U. S. 423 (1809).

[32] Missouri, K. & T. Co. *v.* Elliott, 102 Fed. 96 (C. C. A., Eighth Circ., 1900).

[33] Simpson *v.* First National Bank, 129 Fed. 257 (C. C. A., Eighth Circ., 1904); Barber A. P. Co. *v.* Forty-Second St., etc. Ry. Co., 180 Fed. 648 (C. C. A., Second Circ., 1910); St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55, affirmed 88 Mo. 202 (1885).

[34] L'Herbette *v.* Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368 (1894).

[35] American Surety Co. *v.* Pauly, 170 U. S. 133 (1898); Fidelity & Deposit Co. *v.* Courtney, 186 U. S. 342 (1902); Bank of Overton *v.* Thompson, 118 Fed. 798 (C. C. A., Eighth Circ., 1902); Dillaway *v.* Butler, 135 Mass. 479 (1883); Allen *v.* South Boston R. Co., 150 Mass. 200, 22 N. E. 917 (1889); Benedict *v.* Arnaux, 154 N. Y. 715, 49 N. E. 326 (1898); Brooklyn, etc. Co. *v.* Standard, etc. Co., 193 N. Y. 551, 86 N. E. 564 (1908).

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that an agent discloses to his principal whatever is known to the agent and pertinent to the agency is not pushed to the absurdity that the agent is presumed to disclose to the principal the fraud which the agent is working upon him. The same principle applies to book entries. An entry fraudulently made upon the corporate books is not an admission by the corporation or binding upon it unless the corporation be estopped to show the fraud.[36] In fairness a similar rule should obtain with respect to notice from such fraudulent entries. Indeed there is authority which looks in this direction. Thus one who becomes surety upon a fidelity bond given to a corporation to secure the honesty of an employee is not discharged because the corporation does not disclose that the employee is dishonest, where such dishonesty was unknown to the agents of the corporation who took the bond on its behalf, even though such dishonesty would have been discovered had those agents used due care in examining its books.[37] It is true that in none of these cases was the effect of the books as notice directly considered. Yet these cases indicate, if they do not decide, that entries made in fraud of the corporation are not notice to the corporation. To render the entry notice to the corporation it must be made upon its behalf in the usual course of business.

## IV.

We now reach the last phase of our problem. Assume that the corporation has notice of a certain fact from its books or otherwise, but that the officer who acts on its behalf is personally ignorant of the fact in question. Is the corporation bound by knowledge of the fact? This is the converse of the usual problem of the ignorant principal and the well-informed agent. In the present case the principal knows and the agent does not know.

Logically the problem is not difficult. As has been already shown the law, under the proper circumstances, charges an inno-

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[36] Holden *v.* Hoyt, 134 Mass. 181 (1883); City Electric St. Ry. Co. *v.* First National Bank, 62 Ark. 33, 34 S. W. 89 (1896).

[37] Tapley *v.* Martin, 116 Mass. 275 (1874); Bowne *v.* Mount Holly Bank, 45 N. J. L. 360 (1883); Wayne *v.* Commercial National Bank, 52 Pa. St. 343 (1866); Bennett *v.* Building Association, 57 Tex. 72 (1882). But the surety would be discharged if such information were knowingly withheld. Railton *v.* Matthews, 10 Cl. & Fin. 934 (1844); Smith *v.* Governor, etc. of Bank of Scotland, 1 Dow 272 (1813).

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cent principal with the knowledge possessed by his agent.[38] It is just that the principal who carries through a transaction by means of several agents should stand legally in the same situation as if he had performed the whole operation in person. Were this not the rule a man could escape all knowledge by multiplying agents. Since for this purpose the law under certain conditions identifies agent and principal, it does not seem material in which of them the knowledge is. If the knowledge of the agent may by law affect the principal, the knowledge of the principal should equally affect the acts performed for him by the agent. In justice the rule should work both ways. Yet the cases are few.

In Mechanics' Bank of Alexandria *v.* Seton,[39] Seton brought a bill in equity to compel the bank to transfer to him certain stock of the bank which stood upon the books in the name of one Lynn, alleging that Lynn held the stock as trustee for him. The bank set up in defense that it had made loans to Lynn in good faith upon the security of the stock. The proof tended to show that at the time the stock was entered on the books in the name of Lynn notice of the trust was given to the then board of directors. Subsequently a different board made loans to Lynn upon the security of the stock in ignorance of the trust. The court decided that the bank was charged with notice of the trust. The principle is thus stated by Thompson, J.:

"Notice to the board of directors when this stock was transferred to Lynn that he held it in trust only was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that if the bank had sustained any injury by reason of the subsequent board not knowing that Lynn held the stock in trust, it would result from the negligence of its own agents and could not be visited upon the complainants."

In Curtice *v.* Crawford County Bank [40] the question was whether the defendant bank obtained a statutory lien upon certain stock with notice of the rights of the plaintiff in such stock. The Court

[38] Duncan *v.* Jaudon, 15 Wall. (U. S.) 165 (1872). See also Armstrong *v.* Ashley, 204 U. S. 272 (1906).

[39] Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. (U. S.) 299 (1828). See also New England Car-Spring Co. *v.* Union India Rubber Co., 4 Blatchf. 1, 7 (C. C., Second Circ., 1857); Allen *v.* Puritan Trust Co., 211 Mass. 409, 420, 97 N. E. 916, 920 (1912). already discussed, p. 244.

[40] 118 Fed. 390 (C. C. A., Eighth Circ., 1902).

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of Appeals found that two or three years before the bank made its loans upon the stock Curtice gave notice of his interest to Turner, the president of the bank, and that the loans were made by other officers of the bank who were ignorant of the plaintiff's rights. The court, in deciding that the bank took subject to Curtice, said, by Thayer, J.:

"Under these circumstances we are of opinion that Turner must be regarded as having been acting for the bank when he received notice that the stock was held in pledge by Curtice, and that the knowledge which was acquired in the course of that interview affected the bank generally even if it was not communicated to the other executive officers. It was at least knowledge of a fact which ought to have been communicated to the other officers of the corporation to govern their future action."

In Elliott *v.* Worcester Trust Co.[41] the plaintiff sued to recover a sum of money which had been deposited in the City National Bank with which the defendant had merged. The defendant set up as a defense that this deposit had been paid out to take up notes of the plaintiff payable at the City National Bank. The agreed facts admitted that prior to the merger the plaintiff had notified the City National Bank not to pay such notes and that none of the defendant's officers knew of such notice. Upon the plaintiff's account was stamped a notice that the deposit was "held on the same terms as it was held by the City National Bank." The court decided that the defendant was bound by the notice given to its predecessor even though this was not known to any of the defendant's officers.

In Gibson *v.* National Park Bank [42] a certain railroad carried its deposit with the defendant bank in the name of its treasurer. This was known to the executive officers of the bank. The account was attached as the account of the railroad by a railroad creditor. It was thereafter paid out by a teller who did not know of the attachment. The attaching creditor sued the bank, and it was held that he could recover. Chief Justice Ruger thus states the principle:

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[41] 189 Mass. 542, 75 N. E. 944 (1905). See also Allen *v.* Puritan Trust Co., 211 Mass. 409, 420, 97 N. E. 916, 920 (1912).

[42] 98 N. Y. 87 (1885).

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"It [the bank] cannot shield itself from liability by alleging the ignorance of the agent making the payment, while other agents, having authority and owing a duty to act in the premises had knowledge of the facts, which made such payment a violation of duty on the part of the corporation."

The English cases should be considered by themselves in chronological order.

In Mayhew *v.* Eames [43] the plaintiffs brought assumpsit against a common carrier for the loss of a package containing £87 in bank notes. The defendant relied upon a notice given to the plaintiffs themselves, that he would not be liable for any package exceeding £50 in value unless that value was stated and paid for accordingly. The clerk who did up the package and delivered it to the defendant knew the contents of the package but was ignorant of the notice. In directing a nonsuit Abbott, C. J., said:

"The traveller was their [plaintiff's] agent and made the contract solely on their behalf; and as it is so the notice applies as much as if they had themselves given the parcel out to be carried."

The case was then carried to the Court of King's Bench,[44] which affirmed the judgment *per curiam:*

"But the knowledge of the principal is the knowledge of the agent. . . . But as the plaintiffs suffered their agent to send notes by these coaches, we think that knowledge of the notice having been brought home to the plaintiffs the carrier is thereby protected from such loss, although the parcel was sent by an agent."

Willis *v.* Bank of England [45] was an action of trover by the assignee in bankruptcy of N. to recover the value of three post bills which had been accepted by the bank. On March 16 the assignee gave notice to the London office of the bank to stop payment on the bills. On April 12 N. cashed the bills before maturity at the Gloucester branch of the bank. The agent at the Gloucester branch was ignorant that notice to stop payment had been given. There was a verdict for the plaintiff which was upheld on appeal. Lord Denman thus states the rule:

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[43] 1 Car. & P. 550 (1825). [44] 3 B. & C. 601 (1825).

[45] 4 Ad. & E. 21 (1835). Both cases were cited and distinguished in Powles *v.* Page, 3 C. B. 16 (1846).

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"The general rule is that notice to the principal is notice to all his agents; at any rate if there be reasonable time, as there was here, for the principal to communicate that notice to his agents before the event which raises the question happens."

The case of Cornfoot *v.* Fowke,[46] which must next be considered, has been the subject of considerable judicial limitation and criticism. In brief the facts were these. The plaintiff sued upon a written agreement to take a lease of a furnished house. The defendant pleaded that he was induced to make the agreement "by means of the fraud, covin, and misrepresentation" of the defendant. The evidence tended to show that before the agreement was made the defendant asked the agent of the plaintiff: "Pray, sir, is there anything objectionable about the house?" that the agent replied: "Nothing whatever"; that the house next door was a brothel; that this was known to the plaintiff but not to his agent; and that the plaintiff did not know of the representation. The Court of Exchequer gave judgment for the defendant. The reasons given were various. Rolfe, B., held that the authority of the agent to make the representation had not been shown. Parke, B., and Alderson, B., held that the plea of "fraud and covin" had not been made out by proof that the agent innocently represented that there was nothing objectionable about the house while the principal knew that there was a brothel next door. Lord Abinger, C. B., dissented on the ground that for the purpose of the plea the representation of the agent was to be considered that of the principal, and the falsity of the representation to the knowledge of the principal was sufficient to sustain the plea.

The opinions of Parke, B., and Alderson, B., proceed upon the theory that proof of conscious moral obliquity, either in the agent or in the principal, is essential to sustain a plea of fraud and covin. They then draw the obvious conclusion that an innocent principal who has knowledge and an innocent agent who makes a misrepresentation do not, even if added together, produce the conscious moral obliquity demanded by the plea. Lord Abinger, on the other hand, maintains that moral obliquity need not be proved to sustain a plea of fraud and covin. He considers that the knowledge of the principal and the innocent misrepresentation of the agent must be

[46] 6 M. & W. 358 (1840).

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considered together, and so considered are sufficient to sustain the plea. Plainly, therefore, the question decided was as to the nature of the proof required to sustain a plea of fraud and covin.[47]

Moreover, the decision is considerably shaken by the later case of Ludgater *v.* Love.[48] That was an action for damages for an alleged fraudulent representation by the son of the defendant upon the defendant's behalf. The son, to induce the plaintiff to buy certain sheep belonging to the father, represented that the sheep were all right. The defendant purchased in reliance upon this representation. In fact the sheep had the rot. This the father knew when he committed the sheep to the son to sell, but withheld the information from the son, who acted in good faith. The jury found these facts specially, and a verdict was entered for the plaintiff. The case was thereupon taken to the Court of Appeal, where the judgment was affirmed. In the course of his opinion Brett, L. J., said:

"If the son was authorized to make the representations, whether such authority was express or implied, we are of opinion that the defendant was, by reason of his own fraudulent mind, liable, notwithstanding want of fraud in the son. We are of this opinion notwithstanding the decision of Cornfoot *v.* Fowke (*ubi sup.*) if that decision is contrary to this view."

The four American cases, then, are unanimous in holding that a corporation affected with notice does not escape the effect of such notice because the facts are not known to the agent who acts on its behalf. New York, Massachusetts, and the federal courts all take this view. The English cases, on the other hand, are somewhat wavering. Mayhew *v.* Eames and Willis *v.* Bank of England decide squarely that if the principal has notice he is bound even though the agent is ignorant. Then comes the confusion created by Cornfoot *v.* Fowke. This injects into the situation the rather narrow English rule that to sustain an allegation of fraud there must be proof of *conscious* moral obliquity.[49] In this respect the

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[47] See the remark of Willes, J., during the argument in Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259 (Ex. Ch. 1867), and the careful explanations of the case by Lord Brougham and Lord St. Leonards in National Exchange Co. *v.* Drew, 2 Macq. 103, at pp. 108 and 144 (H. L., 1855).

[48] 44 L. T. R. N. S. 694 (C. A., 1881). See also Fuller *v.* Wilson, 3 Q. B. 58, s. c. reversed on a point of pleading *sub nom.* Wilson *v.* Fuller, 3 Q. B. 68, 1009 (Ex. Ch., 1843).

[49] See Derry *v.* Peck, 14 App. Cas. 337 (1889).

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American cases lay stress upon the result to the injured party instead of upon the state of mind of the man who makes the representation. Thus in this country the better view is that deceit will lie where a representation of fact, made as of knowledge and relied upon, is untrue, even though the party who made the representation honestly believed it to be true.[50] Cornfoot *v.* Fowke, however, has been considerably limited and criticized, and in the later case of Ludgater *v.* Love is treated as of slight authority. It must be remembered, also, that all these English cases except Willis *v.* Bank of England deal with human principals. That case concerned a corporation and is in accord with the American view. In view of the peculiar judicial history of Cornfoot *v.* Fowke, Willis *v.* Bank of England seems to be unshaken and to be the controlling authority.

Both upon principle, then, and upon authority a corporation as matter of law is charged with knowledge of entries made upon its books on its behalf in the usual course of business. If facts so recorded are material the corporation cannot escape the effect of such notice because the agent who acts on its behalf is ignorant of the entries. The cases suggest that the agent is constructively charged with such knowledge, and that his constructive knowledge becomes the constructive knowledge of the corporation. This seems rather like whipping the devil round a stump in order to attain a just result. It is far simpler and more logical to hold that entries made upon the corporate books on its behalf and in the usual course of business are notice directly to the corporation as matter of law.

*Edwin H. Abbot, Jr.*

BOSTON, MASS.

[50] Litchfield *v.* Hutchinson, 117 Mass. 195 (1875); Fisher *v.* Mellen, 103 Mass. 503 (1870); Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726 (1889); Lehigh Zinc, etc. Co. *v.* Bamford, 150 U. S. 665 (1893).

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Edwin H Abbot Jr

# EXTINGUISHMENT OF EASEMENTS BY IMPOSSIBILITY OF USER.

Suppose that the owners of Blackacre have a right to use a well or wharf situated on Whiteacre. It is manifest that a right to pass and repass over Whiteacre to the well or wharf is an incident of the easement.[1] Suppose that the wharf is destroyed by the act of God or taken by eminent domain; what is the effect on the right to pass and repass? Suppose that the owner of the well wrongfully destroys it, what is the effect, if any, on the easement? Or, to put the problem in another way, what is the effect of impossibility of user upon an easement?

An easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land may have in the lands of another.[2] It is a right of land against land. It runs with the dominant tenement against the servient tenement. Hence a true easement has three necessary elements; a parcel of land to which it is appurtenant, the parcel of land which is subject thereto, and the right itself, whatever it may be.[3] It is true that some states permit the creation of an easement in gross[4]—that is, a right without profit which a given individual may have in the lands of another. The cases supposed, however, will apply with equal force to easements in gross. The distinction, therefore, between true easements and easements in gross need not be further considered.

## I.

An easement may be appurtenant to the fee,[5] or to some lesser estate, such as an estate for life[6] or years.[7] It may also be ap-

[1]Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446; Central Wharf *v.* India Wharf (1878) 123 Mass. 567; Ballard *v.* Butler (1849) 30 Me. 94; Freedom *v.* Norris (1891) 128 Ind. 377; Hahn *v.* Baker Lodge (1891) 21 Ore. 30.

[2]See cases collected 14 Cyc. 1139 note 2.

[3]See cases collected 14 Cyc. 1139 note 8.

[4]14 Cyc. 1140.

[5]Weis *v.* Meyer (1891) 55 Ark. 18.

[6]Hoffman *v.* Savage (1818) 15 Mass. 130; Maguire *v.* Safford (1901) Mass. Land Ct. Dec. 58.

[7]Newhoff *v.* Mayo (1891) 48 N. J. Eq. 619; see also Powers *v.* Harlow (1884) 53 Mich. 507, and cases cited in notes 8 and 9.

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purtenant to a particular structure[8] on the land, as distinguished from the land itself. Indeed, the right may even be appurtenant to a portion of a structure such as the second story of a building.[9] The distinction between an easement appurtenant to the fee, and an easement appurtenant to some lesser estate or to a particular structure is vital. It is clear that the easement can be no greater than that to which it is appurtenant. If the estate to which the easement is appurtenant determines or if the thing to which it is appurtenant is destroyed the easement must of necessity perish for want of a dominant estate.

In *Weis* v. *Meyer*[10] the owners of Lot A. had an easement to land upon Lot B., which touched the Mississippi river. The river washed away the dominant tenement. Held, that the easement was thereby extinguished.

In *Hoffman* v. *Savage*[11] a right of way was appurtenant to a dower estate. Held, that the death of the dowager terminated the easement.

In *Day* v. *Walden*[12] a right of flowage was appurtenant to a particular mill structure. The mill burned. Held, that the easement of flowage determined.

In *Cotting* v. *Boston* [13] a right of way was appurtenant to a particular store. The owner of the dominant tenement pulled down this store and erected a new one in its place of exactly similar dimensions. Held, that the easement was thereby ended.

In *National Guaranteed Manure Co.* v. *Donald*[14] an easement to take water was appurtenant to a particular canal. Held, that the right ceased when the canal was filled up.

In *Hahn* v. *Baker Lodge*[15] the plaintiff conveyed to the de-

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[8]Day *v.* Walden (1881) 46 Mich. 575 (mill); Taylor *v.* Hampton (S. C. 1827) 4 McCord 96 (mill); Nagaunee etc. Co. *v.* Iron Cliffs Co. (1903) 134 Mich. 264 (smelting furnace); National etc. Co. *v.* Donald (1859) 4 Hurl & N. 8 (canal); Cotting *v.* Boston (1909) 201 Mass. 97 (store).

[9]Hahn *v.* Baker Lodge (1891) 21 Ore. 30.

[10](1891) 55 Ark. 18.

[11](1818) 15 Mass. 130; Maguire *v.* Safford (1901) Mass. Land Ct. Dec. 58, *accord.*

[12](1881) 46 Mich. 375. *Cf.* Hottell *v.* Farmers' Protective Ass'n. (1898) 25 Colo. 67.

[13](1909) 201 Mass. 97. *Cf.* City Nat. Bank *v.* Van Meter (1899) 59 N. J. Eq. 32.

[14](1859) 4 Hurl and N. 8. Jessup *v.* Loueks (1867) 55 Pa. St. 350; Riefler & Sons *v.* Wayne etc. Co. (1911) 232 Pa. St. 282, *accord.*

[15](1891) 21 Ore. 30. Shirley *v.* Crabb (1894) 138 Ind. 200; Bonney *v.* Greenwood (1902) 96 Me. 335, *accord*

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fendant the second story of a certain building with a right of way to such second story. The building burned. Held, that the right of way determined.

II.

The nature and extent of the servient estate may vary like the nature and extent of the dominant estate. Sometimes the fee iself is made subject to the right of the dominant tenement. On the other hand, the servient tenement may be only an estate for years,[16] or the right may be a limited one such as to maintain a railway[17] or a railroad crossing.[18] Again the right may be only to use a present existing structure such as a wharf,[19] a privy,[20] a well,[21] a stairway,[22] a party wall,[23] or a chimney.[24] Thus the link which binds the dominant to the servient estate may be of varying strength or permanence. Destruction of this link, like destruction of the dominant tenement or estate, is fatal to the easement.

Thus in *Central Wharf* v. *India Wharf*[25] the destruction of a dock by eminent domain was held to terminate the right to use it or any part of the servient tenement.

In *Ballard* v. *Butler*[26] even the wrongful destruction of a well was held to have determined the easement to use it.

In the same way a right to use a particular stairway ends with the destruction of the stairway,[27] even though a similar stairway replaced it.[28]

Again where two buildings have a mutual easement of support in a party wall, destruction of the wall terminates the easement and

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[16]Newhoff *v.* Mayo (1891) 48 N. J. Eq. 619.

[17]Bangs *v.* Potter (1883) 135 Mass. 245; Southern Ry. Co. *v.* City of Memphis (1899) 97 Fed. 819.

[18]*In re* Railroad Commissioners (1897) 91 Me. 135.

[19]Central Wharf *v.* India Wharf (1878) 123 Mass. 567.

[20]Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446.

[21]Ballard *v.* Butler (1849) 30 Me. 94.

[22]Shirley *v.* Crabb (1894) 138 Ind. 200; Willard *v.* Calhoun (1886) 70 Ia. 650; Stenz *v.* Mahoney (1902) 114 Wis. 117; Bonney *v.* Greenwood (1902) 96 Me. 335.

[23]Hoffman *v.* Kuhn (1880) 57 Miss. 746; Heartt *v.* Kruger (1890) 121 N. Y. 386; Duncan *v.* Rodecker (1895) 90 Wis. 1.

[24]Canny *v.* Andrews (1877) 123 Mass. 155.

[25](1878) 123 Mass. 567.

[26](1849) 30 Me. 94.

[27]See note 22.

[28]Stenz *v.* Mahoney (1902) 114 Wis. 117; *cf.* Cotting *v.* Boston (1909) 201 Mass. 97 and Douglas *v.* Coonley (1898) 156 N. Y. 521.

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neither party may rebuild the wall without a fresh agreement.[29] On the other hand, if the wall be injured, but not destroyed, it may be repaired,[30] though the decisions are conflicting as to the effect of destruction of the buildings leaving the wall fit for use after repairs.[31]

III.

As has been already shown termination of the dominant or of the servient estate ends the easement. In the one case there is no estate which can claim the easement; in the other there is no estate on which the right can operate. The same result was held to follow where the right was appurtenant to a particular structure or a particular structure was servient thereto. Here, of course, destruction of the structure did not render user of the easement absolutely impossible. A similar structure might replace it and user go on precisely as if no accident had occurred. But private easements are not favored by the courts because of their restrictive character. They run with the land and burden it. Consequently the courts have been very ready to find that the parties intended to restrict the right to some particular structure which ultimately would be destroyed and thereby relieve the land of what might otherwise be a perpetual servitude.

The same tendency is apparent with respect to the incidents of an easement. Thus a right to use a particular structure on the servient tenement necessarily includes as an incident a right to pass and repass to such structure.[32] If the particular structure be destroyed, as has been shown, the right to use it ceases. But the right to pass and repass thereto may have been of considerable incidental benefit to the dominant estate. Yet the incidental right is held to cease with the principal right.

In *Freedom* v. *Norris*,[33] the town of Freedom had a right to pass and repass over the land of Norris to a landing on the White River. Commerce ceased on the White River and the landing was abandoned. Held, that the right to pass and repass determined.

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[29]See note 23. *Cf.* Douglas *v.* Coonley (1898) 156 N. Y. 521.

[30]Brondage *v.* Warner (N. Y. 1841) 2 Hill 145. But repairs cannot be compelled in the absence of express agreement to repair. Pierce *v.* Dyer (1872) 109 Mass. 375.

[31]Hoffman *v.* Kuhn (1880) 57 Miss. 746. *cf.* Brondage *v.* Warner (N. Y. 1841) 2 Hill 145.

[32]See note 1.

[33](1891) 128 Ind. 377.

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In *Willard* v. *Calhoun*[34] the plaintiff owned the west third of a certain building, the defendant owned the middle third and one Brown the east third. The plaintiff had an easement of passage over a stair on Brown's land and through the hall on Calhoun's land to the upper floor of his third of the building. By certain foreclosure proceedings the right to use the stair was lost, but the plaintiff brought a bill in equity to restrain Calhoun from obstructing user of Calhoun's hallway. Held, that the right to use the hallway determined with the right to use the stair.

In *Mussey* v. *Union Wharf*[35] the plaintiff had an easement of passage for vessels over flats to and from his land. The City of Portland laid out a street between the plaintiff's land and the water which prevented vessels from reaching plaintiff's land. The defendant proposed to build a wharf on the flats beyond the street. Held, that the plaintiff's easement ceased when the street was laid out.

In *Hancock* v. *Wentworth*[36] the owner of certain premises had the privilege of using certain privies on Mill Creek, together with a right to pass and repass thereto. The City of Boston laid out a street over the land on which the privies stood and destroyed them. The court in an elaborate *dictum* intimated that the incidental right to pass and repass ceased with the destruction of the privies.

In *Central Wharf* v. *India Wharf*[37] the defendant, who owned an open dock, granted the plaintiff the use thereof together with free ingress and egress thereto. The deed further provided that no building should be erected within the bounds of the dock. Thereafter the City of Boston constructed a street between the shore line and the dock and filled up the dock. The defendant then built on the land so filled and the plaintiff brought an action of tort for disturbance of his easement. The Court held that the construction of the street rendered user of the easement impossible and thereby extinguished it; and that the right of ingress and egress, and also the right to have no building erected within the dock were incidents of the principal easement and determined therewith.

In *Bangs* v. *Potter*[38] the common grantor of plaintiff and defendant sold certain lots with reference to a plan which reserved a strip fourteen feet wide between the lots for a spur-track. The grantees received the fee in this strip subject to the use for the

[34] (1886) 70 Ia. 650.
[35] (1856) 41 Me. 34.
[36] (Mass. 1843) 5 Metc. 446.
[37] (1878) 123 Mass. 567.
[38] (1883) 135 Mass. 245.

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track. The use of the spur-track was abandoned but the strip remained open and was used as a way, though not long enough to give a prescriptive right to such use. So long as the strip remained open the various lots were benefitted by the additional light and air. The defendant built on his part of the fourteen foot strip and the plaintiff brought a bill in equity to restrain him. Held, that the easement reserved was for a spur-track only, and when this use was abandoned all restriction upon the use of the strip ceased.

In *Day* v. *Walden*[39] the plaintiff had a mill to which was appurtenant an easement to maintain a dam for water-power. The mill burned, and the defendant (owner of the servient tenement) removed the dam whereupon the plaintiff brought an action on the case. Held, that the easement was appurtenant to the particular mill structure which burned and ceased therewith.

Cooley, *J.* said: "Such a grant, in its enjoyment, is as permanent only as the creation of which it is an incident, and necessarily as unstable. Like the natural phenomenon of the shadow cast by a substance, it vanishes when the substance disappears."

In *Hahn* v. *Baker Lodge*[40] the plaintiff conveyed to the defendant the second story of a certain building together with a right of ingress and egress thereto. The building burned. Held, that all interest which the defendant had in the soil determined and with it the right of ingress and egress.

*In Southern Ry. Co.* v. *Memphis*[41] the defendant city granted to the plaintiff the right to construct and operate in certain streets a single track street railway "by horse or other animal power." After the tracks were laid it was found impossible to operate the railway by horse or other animal power by reason of the steepness of the grade. For a time the city permitted the plaintiff to use a small dummy engine but subsequently withdrew this permission and proposed to tear up the tracks, whereupon the plaintiff brought a bill in equity to prevent such removal. The bill was dismissed upon the ground that since operation in the prescribed manner was impossible the incidental right to maintain the tracks also ceased. Lurton, *J.*, said:

"That which is only accessory cannot subsist when the principle right is lost."

[39] (1881) 46 Mich. 575, 586. See also Jessup *v.* Loucks (1867) 55 Pa. St. 350, 362; Negaunee Iron Co. *v.* Iron Cliffs Co. (1903) 134 Mich. 264, 286, where the court uses the same figure.

[40] (1891) 21 Ore. 30. See *ante* note 15.

[41] (1899) 97 Fed. 819, 821.

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IV.

An easement to use a particular structure ceases when the structure is destroyed. The continuance of the structure is really an unexpressed condition of the easement. Contracts touching a particular subject matter are subject to a similar condition.[42] But the condition may happen in various ways. The structure may be destroyed by the act of God, by the wrongful act of a third party, by eminent domain or by the wrongful act of either party to the easement. As has been already shown destruction of the structure by the act of God, by eminent domain or by the act of the owner of the dominant tenement terminates the easement and its incidents. By analogy the same result should be reached where the structure is destroyed by the wrongful act of a third party. In all these cases the condition has happened without any fault on the part of the owner of the servient tenement. While therefore, the wrongdoer may be held responsible in damages[43] and compensation may be obtained in eminent domain proceedings[44] no right either in law or in equity continues against the servient tenement.

Suppose, however, that the servient structure be destroyed wrongfully by the owner of the servient tenement. It is still true that the condition which terminates the easement has happened. Yet it has happened by the wrong of the party whose estate is subject to the easement. One case intimates that at law the easement has determined.[45] But the rights of the parties in equity seem to be open upon the authorities.

The question involves several conflicting principles. In the first place it is a familiar maxim that a man shall not profit by his own wrong. But this maxim would scarcely enable the chancellor to decree that the easement should be appurtenant to the fee. Such a decree would give the dominant tenement an absolute easement instead of a conditional one. Moreover, it would

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[42] Scruggs *v.* Driver (1857) 31 Ala. 274; Fritzler *v.* Robinson (1886) 70 Ia. 500; Gibson *v.* Pelkie (1877) 37 Mich. 380; Blake *v.* Lobb's Estate (1896) 110 Mich. 608; Cook *v.* Andrews (1880) 36 Oh. St. 174; Muhlenberg *v.* Henning (1887) 116 Pa. St. 138; United States *v.* Charles (1896) 74 Fed. 142; Ridgley *v.* Conewago Iron Co. (1893) 53 Fed. 988; Couturier *v.* Hastie (1856) 5 H. L. Cas. 673; Lord Clifford *v.* Watts (1870) L. R. 5 C. P. 576.

[43] Ballard *v.* Butler (1849) 30 Me. 94.

[44] Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446, *semble;* Central Wharf *v.* India Wharf (1878) 123 Mass. 567, *semble,* though not if the easement has been previously terminated by the act of God. Shawmut Nat. Bank *v.* Boston (1875) 118 Mass. 125.

[45] Ballard *v.* Butler (1849) 30 Me. 94.

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by judicial decree make for the parties a bargain which they never made for themselves. Cases touching the reformation of instruments declare that the chancellor has no power to make a contract for the parties.[46] It may well be doubted, therefore, whether the court could properly make such a decree.

The same argument applies in principle to a decree which would compel the restoration of the structure destroyed. The contract of the parties attached the easement to a particular structure. That structure has ceased to exist. No power can bring back *that particular building*. The most that can be done is to create a *new building* which is precisely similar. But the parties have not attached the easement to this new building.[47] To forge the connecting link a new bargain is required. True, it may be urged that easements are created by prescription. To this extent the law does in effect make a contract for the parties—upon the somewhat violent fiction that adverse user for the prescriptive period is evidence of a lost grant. But this is an anomaly which would scarcely warrant the chancellor in making a new bargain for the parties.

Moreover, another principle or rather practice of courts of Chancery points to the same result. Equity is very slow to assume the burden of superintending the erection of structures. It is true that equity in a clear case may compel the removal of a structure. But that is the converse of the problem here. Moreover destruction involves far less superintendence than construction. And in this case the construction (if ordered) raises problems of peculiar nicety since the new building must exactly correspond to the old. In one case, it is true, equity did order the installation of a heating apparatus.[48] But this case comes very close to the boundary of affirmative relief. It seems likely therefore, that this practical consideration would weigh heavily with the chancellor.

In view of these conflicting principles even a tentative prophecy seems of doubtful value. The most that can be said is that each case must be rested on its own particular facts. If the injury to the plaintiff were great and irreparable, and if the court could efficiently grant relief it may be that the court would set off the

[46]Gun *v.* McCarthy (1884) L. R. Ir. 13 Ch. D. 304. See also Grant Marble Co. *v.* Abbott (1910) 142 Wis. 279; Glass *v.* Hulbert (1869) 102 Mass. 24, 44

[47]Cotting *v.* Boston (1909) 201 Mass. 97. Stenz *v.* Mahoney (1902) 114 Wis. 117.

[48]Jones *v.* Parker (1895) 163 Mass. 564.

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wrong of the defendant against the impropriety of making a contract by judicial decree. But if damages would substantially compensate the plaintiff, the court would have a strong tendency to overlook some inadequacy in the relief and leave the plaintiff to his remedy at law.

In summary then we have the following propositions:

1. Where an easement is appurtenant to an estate less than a fee, or where an estate less than a fee is subject to the easement, termination of such estate, determines the easement also.

2. Where an easement is appurtenant to a given structure as distinguished from the fee, or when a given structure as distinguished from the fee is subject to an easement, destruction of such structure by the owner or by the act of God, or by operation of law, extinguishes the easement.

3. Where a limited easement for a particular purpose is created and user of such easement is either originally impossible, or becomes impossible, by the act of God or by operation of law, the easement is thereby extinguished.

4. Where an easement consists of a principal right and certain incidents, determination of the principal right determines the incidents also even though such incidents, if continued, would be beneficial to the dominant estate.

5. If the owner of the servient tenement should wrongfully destroy such tenement, the extent to which equity will lend its aid to compel him to restore the tenement and thereby revive the easement is still uncertain upon the authorities and must be decided in the light of general principles and upon the particular circumstances of each case.

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# NOTES.

LEGAL EFFECT OF A PARDON.—A felony at common law was regarded as an act *contra coronam et dignitatem regis.* The king, as head of the commonwealth, was alone interested in this breach of his peace, and a pardon by him wiped out the crime and the infamy attached thereto.[1] In this country the pardoning power,[2] vested generally in the executive by constitutional provision, must be interpreted in the light of the power formerly exercised by the king in England and the colonies.[3] As to its effect opinions differ. The

[1]See Cuddington *v.* Wilkins (1646) Hob. 67, 81.

[2]See United States *v.* Wilson (1833) 7 Pet. 150, 159. A pardon is a deed; it is invalid without delivery and acceptance, Hunnicut *v.* State (1885) 18 Tex. App. 498, 519, and is irrevocable when once granted. Knapp *v.* Thomas (1883) 39 Oh. St. 377.

[3]People *v.* Bowen (1872) 43 Cal. 439; 7 COLUMBIA LAW REVIEW 54.

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Edwin H. Abbot Jr.

# WAYS AND WATERS IN MASSACHUSETTS

BY

EDWIN HALE ABBOT, JR.

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# WAYS AND WATERS IN MASSACHUSETTS

WHEN ways are laid out, relocated, or repaired, problems frequently arise with respect to waters. The surface water which collects on the way must be taken care of. It may be necessary to cross a stream. A stream may rise even within the limits of the way. Surface water may flow on to the way from adjoining estates. The physical problems with respect to these waters are for the engineer. But they raise legal problems as to the relative rights of the public and of abutters. The purpose of this article is to consider the rules of law which govern their solution.

Ways are of different sorts, such as highways, town ways, and private ways. But for the purposes of this article the distinction between these kinds of ways need not be considered. In this article the highway will be treated as the typical way unless something different is expressly stated. The problem, then, is as to the legal rules which govern the relation between highways and waters.

In Massachusetts the fee of the highway is generally in the abutter.[1] But the fee is subject to the easement of passage incident to the highway. Moreover, the highway easement is of far-reaching character. It is not confined to a simple right on the part of the public to pass and repass on foot or in vehicles. The public as an incident of the easement may place structures in the way. Thus, poles,[2] pipes,[3] and wires[2] impose no additional servitude. Sewers may be built beneath the highway without "taking" any additional property.[4] Even a subway gives the owner of the fee no right to complain.[5] Horse[6] and trolley[7] roads are likewise

[1] Boston *v.* Richardson, 13 Allen 146 (1866).

[2] Pierce *v.* Drew, 136 Mass. 75 (1883); Cheney *v.* Barker, 198 Mass. 356, 84 N. E. 492 (1908).

[3] Bishop *v.* North Adams Fire District, 167 Mass. 364, 45 N. E. 925 (1897).

[4] Lincoln *v.* Commonwealth, 164 Mass. 1, 41 N. E. 112 (1895); Lawrence *v.* Nahant, 136 Mass. 477 (1884).

[5] Sears *v.* Crocker, 184 Mass. 586, 69 N. E. 327 (1904).

[6] Attorney-General *v.* Metropolitan R. R. Co., 125 Mass. 515 (1878); White *v.* Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025 (1901).

[7] Howe *v.* West End Street Ry. Co., 167 Mass. 46, 44 N. E. 386 (1896); Eustis *v.* Milton Street Ry. Co., 183 Mass. 586, 67 N. E. 663 (1903).

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within the easement. But the right to maintain these incidentals of the highway easement continues only so long as the highway itself exists, and ceases if it be discontinued.[8] The constant unfolding of the highway easement so as to permit new uses by the public has left little save a name to the ownership of the fee by the abutter. So long as the highway exists as such the public has a power to act, which is substantially equal to the right of the public in those communities which own the fee of their streets.[9]

The right of the public is confined to the limits of the highway location. Thus where the city, in bringing a street to the established grade, caused the embankment which supported the street to encroach upon the plaintiff's land, the plaintiff may maintain an action of tort therefor and is not liable in tort for digging away the embankment up to his line.[10] Again, an abutter may destroy a gutter which has been built upon his land, even though the water flowing therein is turned back and injures the highway.[11] In neither case was the plaintiff's land "taken" for this purpose. Consequently the act of the public authorities was an unwarrantable encroachment upon land beyond the limits of the highway.

Changes in the highway surface made under public authority within the limits of the highway stand upon a different footing. At common law such changes gave no right of action, if they were made with reasonable care. Thus tort will not lie for damage to an abutter, caused by repairs made in a proper manner in the highway.[12] Indeed the public authorities may change the grade of the highway without incurring common-law liability to abutters, provided the change is made in a reasonable manner.[13] On the other hand, if the work be done negligently or improperly, tort will lie.[14] It has been held, however, that if repairs otherwise proper

[8] New England Tel., etc. Co. *v.* Boston Terminal Co., 182 Mass. 397, 65 N. E. 835 (1903); Boston Electric Light Co. *v.* Boston Terminal Co., 184 Mass. 566, 69 N. E. 346 (1904).

[9] See Commonwealth *v.* Morrison, 197 Mass. 199, 203, 83 N. E. 415, 416 (1908).

[10] Mayo *v.* Springfield, 136 Mass. 10 (1883).

[11] Franklin *v.* Fisk, 13 Allen 211 (1866).

[12] Elder *v.* Bemis, 2 Metc. 599 (1841); Benjamin *v.* Wheeler, 15 Gray 486 (1860); Benjamin *v.* Wheeler, 8 Gray 409 (1857).

[13] Callender *v.* Marsh, 1 Pick. 418 (1823); Purinton *v.* Somerset, 174 Mass. 556, 55 N. E. 461 (1899); Underwood *v.* Worcester, 177 Mass. 173, 58 N. E. 589 (1900).

[14] Perry *v.* Worcester, 6 Gray 544 (1856); Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703 (1886); Brewer *v.* Boston, etc., R. R. Co., 113 Mass. 52 (1873).

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in themselves be made in a proper manner, but with malicious motive, no action lies at common law.[15] At common law, then, the public authorities have a very wide discretion with respect to changes of surface within the highway location. Statutes, as will be later shown, have given damages with respect to some matters for which there was no liability at common law. But the right of the public authorities at common law has far-reaching effects upon the relation of the highway to waters of various kinds.

For the purposes of this article waters may be divided into two main groups, — watercourses and surface waters. A watercourse flows with some regularity between banks more or less defined.[16] Thus, in *Ashley* v. *Wolcott*,[17] Bigelow, J., said (p. 195):

"There is a broad distinction between a regular flowing stream and occasional and temporary outbursts of water, which in times of freshets fill up low and marshy places, and run over and inundate adjoining lands. To maintain a right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel with banks or sides. It need not be shown to flow continually; it may even be dry at times, but it must have a well-defined and substantial existence."

Yet some latitude is allowed with respect to definiteness of banks. Thus, where water flowed between banks with some regularity, then spread with no definite banks for about twelve rods, and then flowed between definite banks again, it was held that it was still a watercourse even at the point where the banks were indefinite.[18] A watercourse, then, is determined by two factors, — definiteness of banks and regularity of flow. Both must be present to a substantial extent. But it seems that some lack in either factor may be compensated by an additional amount of the other factor.

Surface water is water which has not yet become a watercourse.

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[15] Benjamin *v.* Wheeler, 8 Gray 409 (1857); Benjamin *v.* Wheeler, 15 Gray 486 (1860).

[16] Luther *v.* Winnisimmet Co., 9 Cush. 171 (1851); Ashley *v.* Wolcott, 11 Cush. 192 (1853); Dickinson *v.* Worcester, 7 Allen 19 (1863); Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703 (1886); Macomber *v.* Godfrey, 108 Mass. 219 (1871). See also Stimson *v.* Brookline, 197 Mass. 568, 83 N. E. 893 (1908) (ancient ditch treated as watercourse).

[17] 11 Cush. 192 (1853).

[18] Macomber *v.* Godfrey, 108 Mass. 219 (1871).

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Want of definiteness is the earmark of surface water. At times it may be considerable in extent.[19] It may even tend to flow in a definite direction.[20] But it is irregular in flow and has no definite, natural channel. It may become a watercourse, however, at some definite point. Thus, in *Nealley* v. *Bradford*,[21] the master found that what was mere surface water beyond the limits of the highway became a natural watercourse within the limits of the highway. In a word, it is want of regularity and definiteness which distinguishes flow of surface water from a watercourse.

A natural watercourse has been described as a natural easement appurtenant to the soil. Each riparian proprietor has a right that it flow to him substantially as it was wont to flow. The proprietor above may not divert it from the proprietor below; the proprietor below may not back it up upon the proprietor above. It is true that each riparian proprietor is entitled to use the water to some extent upon his tract. But for the purposes of this article, the precise nature and extent of this right to use need not be considered. Here it is sufficient to say that each riparian proprietor is entitled to the stream *ut currere solebat*.[22]

The right of the riparian proprietor to the stream as it was wont to flow does not yield to the highway easement. The public authorities have no inherent right to stop natural watercourses to the damage of riparian owners. Of course the rights of riparian owners are subject to the exercise of eminent domain,[23] just as other property rights are subject thereto. But even when a way is laid out across a natural watercourse, by an authority possessing the power of eminent domain, the rights of riparian owners must be considered. Thus, where a corporation was authorized to lay out a road over a natural watercourse, it was intimated that pro-

[19] Dickinson *v.* Worcester, 7 Allen 19 (1863); Cassidy *v.* Old Colony R. R. Co., 141 Mass. 174, 5 N. E. 142 (1886).

[20] Parks *v.* Newburyport, 10 Gray 28 (1857); Dickinson *v.* Worcester, 7 Allen 19 (1863); Gannon *v.* Hargadon, 10 Allen 106 (1865); Cassidy *v.* Old Colony R. R. Co., 141 Mass. 174, 5 N. E. 142 (1886); Middlesex Co. *v.* McCue, 149 Mass. 103, 21 N. E. 230 (1889); Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327 (1890).

[21] 145 Mass. 561, 14 N. E. 652 (1888).

[22] Merrifield *v.* Lombard, 13 Allen 16 (1866).

[23] Boston Belting Co. *v.* Boston, 152 Mass. 307, 25 N. E. 613 (1890); Boston Belting Co. *v.* Boston, 183 Mass. 254, 67 N. E. 428 (1903); Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838); Moulton *v.* Newburyport Water Co., 137 Mass. 163 (1884).

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vision must be made for the watercourse or else damages paid.[24] And it has been held that a town is liable for permitting a third party to close the openings in a highway bridge built over a tidal stream, whereby the water was set back upon plaintiff's land.[25]

But while the bridge must be adequate to provide for conditions naturally to be anticipated, the city is not liable in tort because the bridge was insufficient for an extraordinary freshet.[26] Yet, where the bridge was negligently built in a manner insufficient to take care of the stream under ordinary conditions, tort will lie, even though the bridge was built under proper authority, since such authority must be reasonably and skillfully exercised.[27] On the other hand, the city is not liable because a bridge originally sufficient becomes insufficient to take care of the natural flow of the stream because of the unauthorized acts of third parties.[28] In bridging natural watercourses, then, the authorities are liable in tort if the bridge be insufficient for conditions naturally to be anticipated, but are not liable for damage due to extraordinary freshets or to the unauthorized acts of third parties.

Culverts are subject to very similar rules. The culvert need only be adequate for the flow of the stream in its natural state.[30] Thus, a city is not liable because a culvert, originally sufficient, becomes insufficient by reason of subsequent alterations in the stream made by the county commissioners.[30] On the other hand, the city must construct and maintain a culvert sufficient for the natural flow of the stream.[31] Thus, tort will lie for failure by the city to use reasonable care to keep the culvert clear, even though the plaintiff owns the land on both sides of the street and the fee of the street.[32] The rule is thus declared by Bigelow, J., in *Parker* v. *Lowell* (p. 357):[33]

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[24] Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838).

[25] Lawrence *v.* Fairhaven, 5 Gray 110 (1855). See also Stimson *v.* Brookline, 197 Mass. 568, 83 N. E. 893 (1908).

[26] Sprague *v.* Worcester, 13 Gray 193 (1859).

[27] Perry *v.* Worcester, 6 Gray 544 (1856).

[28] Wheeler *v.* Worcester, 10 Allen 591 (1865).

[30] Cochrane *v.* Malden, 152 Mass. 365, 25 N. E. 620 (1890). See also R. L., c. 48, § 57, and STAT. 1906, c. 463, § 101.

[31] Parker *v.* Lowell, 11 Gray 353 (1858); Stanchfield *v.* Newton, 142 Mass. 110, 7 N. E. 703 (1886).

[32] Parker *v.* Lowell, 11 Gray 353 (1858).

[33] 11 Gray 353. The language is evidently borrowed from Chief Justice Shaw in

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"It is now the well settled rule of law in this commonwealth that in all cases where a highway, turnpike, bridge, town way or other way is laid across a natural stream of water, it is the duty of those who use such franchise or privilege to make provision by open bridges, culverts or other means for the free current of the water, so that it shall not be obstructed and pent up to flow back on lands belonging to the riparian proprietors. And it is their duty not only to make such bridge, culvert or passage for water, but to keep it in such condition that it shall not obstruct the stream."

Yet natural watercourses and riparian rights may be made to yield to the public interest. Thus, equity will not enjoin a bridge corporation which possesses the right of eminent domain from diverting a natural watercourse into an artificial canal if such a change be reasonably necessary.[34] The riparian owner is left to his remedy in damages under the statute for any acts lawfully done in the exercise of the powers conferred.[35] But where the damage is inflicted unnecessarily[36] or negligently[37] in the exercise of such powers, tort will lie. It has, however, been held that, where the acts were beyond the scope of the powers conferred and not merely an improper exercise of those powers, no action lay against the town,[38] apparently upon the theory that the acts were the acts of the officers, individually, rather than of the public authority. Authority may be given, therefore, to alter natural watercourses

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Lawrence *v.* Fairhaven, 5 Gray 110, 116, (1855). The same rule has been applied to railroads. Estabrooks *v.* Peterborough, etc., R. R. Co., 12 Cush. 224 (1853); Blood *v.* Nashua, etc., R. R. Co., 2 Gray 137 (1854); Mellen *v.* Western Railroad Corp., 4 Gray 301 (1855).

[34] Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838).

[35] Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838) (*semble*); Hull *v.* Westfield, 133 Mass. 433 (1882); Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320 (1889); 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903); Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220 (1900).

[36] Curtis *v.* Eastern R. R. Co., 14 Allen 55 (1867), 98 Mass. 428 (1868).

[37] Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320 (1889); 183 Mass. 254, 67 N. E. 428 (1903); Lawrence *v.* Fairhaven, 5 Gray 110 (1855); Perry *v.* Worcester, 6 Gray 544 (1856); Morse *v.* Worcester, 139 Mass. 389, 2 N. E. 694 (1885). See also Estabrooks *v.* Peterborough, etc. R. R. Co., 12 Cush. 224 (1853); Mellen *v.* Western R. R. Corp., 4 Gray 301 (1855). But if the damage be caused in the exercise of the police power by a city acting in a governmental capacity, no action lies. Harrington *v.* Worcester, 186 Mass. 594, 72 N. E. 326 (1904).

[38] Anthony *v.* Adams, 1 Metc. 284 (1840); Tyler *v.* Revere, 183 Mass. 98, 66 N. E. 597 (1903).

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for public purposes[39] with liability for damages under the statute for acts lawfully done in the exercise of such authority and a further liability in tort for damage unnecessarily or negligently caused by misuse of such powers.

An upper riparian proprietor has no right to pollute the waters of a natural watercourse so as to render them unfit for lawful riparian uses by a lower riparian proprietor.[40] But in *Jackman* v. *Arlington Mills*[40] it was held that he may collect water into a channel and discharge it into a natural watercouse if he does not unduly increase the stream or pollute it. Yet, if he thereby creates a nuisance as to the lower proprietor, tort for nuisance will lie.[41] The lower proprietor may also maintain a bill in equity to prevent invasion of his riparian right,[42] though equity may decline to interfere if no material damage is done and no prescriptive right can be gained.[43] A private riparian owner, then, is not permitted to pollute a natural watercourse to any material extent.

The rights of the public are harder to determine because they are complicated by questions of procedure. The legislature may authorize the taking of or injury to riparian rights with corresponding rights of compensation under the statute.[44] In such a case the acts authorized by the statute cease to be wrongful, and neither a bill in equity[45] nor action of tort[46] will lie therefor

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[39] Beals *v.* Brookline, 174 Mass. 1, 54 N. E. 339 (1899), and n. 23.

[40] Harris *v.* Mackintosh, 133 Mass. 228 (1882); Parker *v.* American Woolen Co., 195 Mass. 591, 81 N. E. 466 (1907); Merrifield *v.* Lombard, 13 Allen 16 (1866); McNamara *v.* Taft, 196 Mass. 597, 83 N. E. 310 (1907); Dwight Printing Co. *v.* Boston, 122 Mass. 583 (1877); Jackman *v.* Arlington Mills, 137 Mass. 277 (1884).

[41] McGenness *v.* Adriatic Mills, 116 Mass. 177 (1874).

[42] Harris *v.* Mackintosh, 133 Mass. 228 (1882); Parker *v.* American Woolen Co., 195 Mass. 591, 81 N. E. 466 (1907); Merrifield *v.* Lombard, 13 Allen 16 (1866); McNamara *v.* Taft, 196 Mass. 597, 83 N. E. 310 (1907).

[43] Brookline *v.* Mackintosh, 133 Mass. 215 (1882).

[44] Washburn & Moen Co. *v.* Worcester, 116 Mass. 458 (1875); Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838); Moulton *v.* Newburyport Water Co., 137 Mass. 163 (1884); Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320 (1889); 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

[45] Rowe *v.* Granite Bridge Corp., 21 Pick. 344 (1838); Washburn & Moen Co. *v.* Worcester, 116 Mass. 458 (1875).

[46] Perry *v.* Worcester, 6 Gray 544, 547 (1856) (*semble*); Flagg *v.* Worcester, 13 Gray 601 (1859); Emery *v.* Lowell, 104 Mass. 13, 16 (1870); Hull *v.* Westfield, 113 Mass. 433 (1882); Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320 (1889); Bainard *v.* Newton, 154 Mass. 255, 27 N. E. 995 (1891); Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220 (1900).

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so long as damage is not negligently caused thereby. Moreover, this is true even though the acts, if unauthorized by statute, would be tortious.[47] The statute in effect takes away the remedy at common law by action of tort and substitutes therefor the statutory remedy.[48] But this renders the statutory remedy exclusive. Consequently the failure of the plaintiff to maintain his action of tort is no indication at all that a common-law right has not been invaded. Such an action may fail either because the injury to the plaintiff is *damnum absque injuria* or because he has mistaken his remedy.

On the other hand, recovery by petition under the statute does not necessarily indicate invasion of a common-law right. The statute may give recovery for injury even where no common-law right is invaded. Thus, the building of a subway in the highway is not an invasion of the common-law right of the abutter.[49] Yet the subway statute has been held to give damages for an act which would impose no liability at common law.[50] A similar liberal construction has been placed upon the grade-crossing act,[51] upon the highway statute,[52] and upon the act which provided for improving Stony Brook,[53] to cite merely two or three examples. Of course the question must depend on the construction of the particular statute involved. But there is a tendency on the part of the court to construe such statutes as *in pari materia* one with the other, upon the ground that they are part of a general scheme of legislation.[54] Hence success under the statute does not indicate the existence of a common-law right any more than failure in tort

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[47] Hull *v.* Westfield, 133 Mass. 433 (1882); Washburn & Moen Co. *v.* Worcester, 116 Mass. 458 (1875).

[48] Perry *v.* Worcester, 6 Gray 544, 547 (1856) (*semble*); Boston Belting Co. *v.* Boston, 149 Mass. 44, 20 N. E. 320 (1889); Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220 (1900). But *cf.* Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89 (1905).

[49] Sears *v.* Crocker, 184 Mass. 586, 69 N. E. 327 (1904).

[50] Fifty Associates *v.* Boston, 201 Mass. 585, 88 N. E. 427 (1909).

[51] Hyde *v.* Fall River, 189 Mass. 439, 75 N. E. 953 (1905), overruling Rand *v.* Boston, 164 Mass. 354, 41 N. E. 484 (1895).

[52] Marsden *v.* Cambridge, 114 Mass. 490 (1874); Woodbury *v.* Beverly, 153 Mass. 245, 26 N. E. 851 (1891).

[53] Boston Belting Co. *v.* Boston, 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

[54] Hyde *v.* Fall River, 189 Mass. 439, 75 N. E. 953 (1905); Fifty Associates *v.* Boston, 201 Mass. 585, 88 N. E. 427 (1909).

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indicates the absence of a common-law right. All that can be said is that in a given case a particular method of procedure has succeeded or failed.

It now remains to consider the cases somewhat in detail. It has been held that tort would not lie for obstructing a watercourse by deposits from drains which carried off the wash from the streets where the amount of water cast into the stream was not greater than the natural surface drainage would have been.[55] The court, however, intimated that, in so far as the damage was caused by wash from the streets, the remedy was under the statute.[55] Again, it was held that tort would not lie for opening a surface-water drain within the limits of the highway into a culvert at a point where the culvert crossed the highway, and thereby causing the culvert to overflow, the remedy, if any, being under the statute.[56] But if large quantities of water are collected from various streets and turned into a natural watercourse, so that it overflows and deposits filth on the land of a lower riparian owner in such quantities as to create a nuisance as to him, it is said that tort will lie.[57]

But where a lower riparian owner was inconvenienced by pollution of a stream due to entering a city drain therein, it was held that there could be no recovery in tort unless the drain was improperly constructed or maintained.[58] It has also been held that equity will not enjoin a city, at the instance of a riparian proprietor, from turning a reasonable amount of surface drainage into a watercourse, even though some pollution was caused thereby, the plaintiff being left to his remedy under the statute.[59] The cases above considered, it should be noted, dealt only with the disposal of *surface* water. Here it seems to be a question of degree.[60] A moderate discharge,[60] or even one which causes some overflow,[61] will not support either an action at law[61] or a bill in equity;[60]

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[55] Wheeler *v.* Worcester, 10 Allen 591 (1865).

[56] Flagg *v.* Worcester, 13 Gray 601 (1859); Emery *v.* Lowell, 104 Mass. 13 (1870); Holleran *v.* Boston, 176 Mass. 75, 57 N. E. 220 (1900). The statute is the statute which deals with the repair of highways, R. S., c. 25, § 6; G. S., c. 44, § 19; P. S., c. 52, § 15; R. L., c. 51, § 15.

[57] Manning *v.* Lowell, 130 Mass. 21, 25 (1880).

[58] Merrifield *v.* Worcester, 110 Mass. 216 (1872).

[59] Bainard *v.* Newton, 154 Mass. 255, 27 N. E. 995 (1891).

[60] *Ibid.*

[61] See n. 56.

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but an immoderate discharge, gathered from a considerable area and sufficient to cause a nuisance,[62] will support an action of tort.

A distinction is made, however, between drainage of *surface* water and *sewers*. Thus, tort will lie for ending a common sewer in the tail race of the plaintiff's mill, even though the sewer enter the tail race where it passed under the highway in a culvert.[63] It is true that, where a statute[64] authorizes the use of a brook as a sewer and gives damages, equity will not restrain the acts authorized by the statute[65] unless they are being performed in a negligent manner,[66] but will leave the parties to the statutory remedy. On the other hand, tort will lie where a city builds a sewer across the plaintiff's land and ends it in the plaintiff's canal, even though the canal was built upon the site of a natural watercourse.[67] And where the city casts sewage into a watercourse[68] or canal[69] in such quantities as to create a nuisance as to the plaintiff, relief may be had both at law[70] and in equity.[71] Logically, perhaps, it is difficult to distinguish between sewers and surface drainage. Yet there is a marked difference in degree. Sewage easily creates a nuisance, while surface water is less apt to do so. Moreover, relief has been given where the quantity and quality of the surface water created a nuisance. Undoubtedly the difference in degree explains the difference in the rule of law.

Artificial streams are entitled to less protection than natural watercourses because of their different origin. In the first place it is wrongful to collect water into an artificial stream or channel

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[62] Manning *v.* Lowell, 130 Mass. 21, 25 (1880).

[63] Nevins *v.* Fitchburg, 174 Mass. 545, 55 N. E. 321 (1899).

[64] STAT. 1867, c. 106. This statute has been frequently construed. See Harrington *v.* Worcester, 186 Mass. 594 (1905), which construes a later enactment.

[65] Washburn & Moen Co. *v.* Worcester, 116 Mass. 458 (1875).

[66] Morse *v.* Worcester, 139 Mass. 389, 2 N. E. 694 (1885).

[67] Proprietors of Locks and Canals *v.* Lowell, 7 Gray 223 (1856).

[68] Woodward *v.* Worcester, 121 Mass. 245 (1876); Whitten *v.* Haverhill, 204 Mass. 95, 90 N. E. 409 (1910); Haskell *v.* New Bedford, 108 Mass. 208 (1871); Brayton *v.* Fall River, 113 Mass. 218 (1873).

[69] Boston Rolling Mills *v.* Cambridge, 117 Mass. 396 (1875). Similarly, as to a mill pond, Middlesex Co. *v.* Lowell, 149 Mass. 509, 21 N. E. 872 (1889).

[70] Haskell *v.* New Bedford, 108 Mass. 208 (1871); Whitten *v.* Haverhill, 204 Mass. 95, 90 N. E. 409 (1910); Brayton *v.* Fall River, 113 Mass. 218 (1873).

[71] Woodward *v.* Worcester, 121 Mass. 245 (1876), Boston Rolling Mills *v.* Cambridge, 117 Mass. 396 (1875); Haskell *v.* New Bedford, 108 Mass. 208 (1871).

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and cast it upon adjoining property.[72] Indeed the wrong does not depend upon the size of the stream. Thus, it has been held that it is improper to cast water artificially upon a neighbor's land, either in a stream or drop by drop.[73] Hence an easement to cast water in this manner may be acquired by prescription,[74] even though no easement is acquired by the flow of mere surface water, however long continued.[75] Indeed, to collect water into a stream and turn it upon the highway has been held to be a public nuisance,[76] for which, it is said, no easement can be acquired.[77] An artificial stream, then, is almost the antithesis of a natural watercourse. A riparian owner has a right to the flow of a natural watercourse in its natural state, unless that right is limited by grant or prescription, while the right to maintain an artificial stream must be acquired by grant or prescription.

The difference between natural watercourses and artificial streams produces a marked difference in rights. Bridges or culverts over natural watercourses must be maintained by the public authorities,[78] while, if an artificial watercourse be lawfully carried under the highway, the liability to repair the bridge is on the party who maintains the watercourse.[79] And where a culvert is placed in the highway to protect it from an artificial mill pond, the public authorities may close the culvert at their pleasure, if no prescriptive right thereto has been gained.[80] Again, the public authorities

[72] Curtis *v.* Eastern R. R. Co., 14 Allen 55 (1867); Curtis *v.* Eastern R. R. Co., 98 Mass. 428 (1868); Bates *v.* Westborough, 151 Mass. 174, 23 N. E. 1070 (1890). See also Fitzpatrick *v.* Welch, 174 Mass. 486, 55 N. E. 178 (1899), and n. 90.

[73] Martin *v.* Simpson, 6 Allen 102 (1863).

[74] White *v.* Chapin, 12 Allen 516 (1866); Rathke *v.* Gardner, 134 Mass. 14 (1883). See also Stimson *v.* Brookline, 197 Mass. 568, 83 N. E. 893 (1908); Dickinson *v.* Worcester, 7 Allen 19, 22 (1863) (*semble*).

[75] Parks *v.* Newburyport, 10 Gray 28 (1857); Rathke *v.* Gardner, 134 Mass. 14 (1883).

[76] Leahan *v.* Cochran, 178 Mass. 566, 60 N. E. 382 (1901); Cavanagh *v.* Block, 192 Mass. 63, 77 N. E. 1027 (1906) (private way); Hynes *v.* Brewer, 194 Mass. 435, 80 N. E. 503 (1907); Field *v.* Gowdy, 199 Mass. 568, 85 N. E. 884 (1908); Drake *v.* Taylor, 203 Mass. 528, 89 N. E. 1035 (1909).

[77] Leahan *v.* Cochran, 178 Mass. 566, 570, 60 N. E. 382 (1901) (*semble*); Holyoke *v.* Hadley Co., 174 Mass. 424, 54 N. E. 889 (1899); Hynes *v.* Brewer, 194 Mass. 435, 80 N. E. 503 (1907).

[78] See n. 24–33 inclusive.

[79] Perley *v.* Chandler, 6 Mass. 453 (1810); Lowell *v.* Proprietors of Locks and Canals, 104 Mass. 18 (1870).

[80] Drew *v.* Westfield, 124 Mass. 461 (1878). But see Stimson *v.* Brookline, 197 Mass. 568, 83 N. E. 893 (1908).

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are not bound to clear a culvert under a highway which carries surface water and under drainage from plaintiff's meadow.[81] Artificial streams, then, may be actually wrongful, and where lawful must be cared for by those who maintain them.

Surface waters have already been distinguished from natural watercourses.[82] The difference is really one of degree. Surface water lacks regularity of flow or definiteness of channel, though it may tend to flow in a certain definite direction and be considerable in amount. Any change of surface generally affects the flow of surface water. Raising the grade may exclude surface water which would otherwise flow on to the premises. Alterations of surface may change the direction in which surface water tends to flow from the place in question. But changes of grade or surface are incidental to control of the surface. If an owner could not make improvements without liability for changes in the behavior of surface water, he would be deprived of effective use of his property. The natural rights of the landowner and the difference in degree between surface water and natural watercourses have led to radical differences in the rules of law applicable to each class. The attitude of law and landowner alike is well illustrated by the following quotation from *Beals* v. *Brookline* (p. 20): [83]

"In the language of the older books surface water is regarded very largely by the law 'as a common enemy which every proprietor may fight or get rid of as best he may.' . . ."

A private owner has large powers and small liabilities with respect to surface water. Thus, no action lies for failure to prevent surface water from flowing on to the land of an adjoining proprietor.[84] But the adjoining proprietor may prevent such flow, even though the water gathers in injurious quantities on the land of the other owner.[85] He may prevent surface drainage from a highway, even though the highway is thereby injured.[86] Indeed

[81] Dickinson *v.* Worcester, 7 Allen 19 (1863).

[82] *Ante*, n. 16–21.

[83] 174 Mass. 1, 54 N. E. 339 (1899).

[84] Morrill *v.* Hurley, 120 Mass. 99 (1876).

[85] Gannon *v.* Hargadon, 10 Allen 106 (1865); Franklin *v.* Fisk, 13 Allen 211 (1866); Bates *v.* Smith, 100 Mass. 181 (1868); Cassidy *v.* Old Colony R. R. Co., 141 Mass. 174, 5 N. E. 142 (1886).

[86] Franklin *v.* Fisk, 13 Allen 211 (1866).

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no prescriptive right to mere surface drainage can be gained.[87] Again, a landowner may change the surface of his land so that surface water which has flowed thereon is turned off on to the land of another.[88] Nor is he liable because ordinary cultivation of his land causes unusual quantities of soil to wash down into a neighboring mill pond.[89] So long as surface water retains its indefinite character, any landowner may exclude it from his premises or turn it on to the premises of another without liability.

But a landowner may not gather surface water into an artificial channel and cast it upon the premises of another.[90] Thus, it is wrong to cast water from a roof against the wall of a neighboring building.[91] And tort will lie where a railroad unnecessarily conducts water in an artificial channel and casts it upon neighboring land, even though the water is first made to percolate through the railroad embankment.[92] Indeed, to gather water into a stream and cast it upon the highway amounts to a public nuisance,[93] for which no prescriptive right can be gained,[94] although one owner may acquire a right by prescription to cast water in a stream on the premises of another.[95] The rule is really the converse of the rule with respect to natural watercourses. A landowner has no inherent right to prevent the ordinary flow of a natural stream to or from his property. Neither may he create an artificial stream and turn it upon the land of another.

The common-law right of the public authorities with respect to surface water in the highway is at least as great as that of the individual owner with respect to surface water on his premises.

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[87] Parks *v.* Newburyport, 10 Gray 28 (1857).

[88] Gannon *v.* Hargadon, 10 Allen 106 (1865).

[89] Middlesex Co. *v.* McCue, 149 Mass. 103, 21 N. E. 230 (1889).

[90] Martin *v.* Simpson, 6 Allen 102 (1863); Curtis *v.* Eastern R. R. Co., 14 Allen 55 (1867); 98 Mass. 428 (1868); Rathke *v.* Gardner, 134 Mass. 14, 16 (1883) (*semble*); Bates *v.* Westborough, 151 Mass. 174, 181, 23 N. E. 1070, 1071 (1890); Fitzpatrick *v.* Welch, 174 Mass. 486, 55 N. E. 178 (1899); Daley *v.* Watertown, 192 Mass. 116, 78 N. E. 143 (1906); Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89 (1905). See also Smith *v.* Gloucester, 201 Mass. 329, 333, 87 N. E. 626, 628 (1909).

[91] Martin *v.* Simpson, 6 Allen 102 (1863).

[92] Curtis *v.* Eastern R. R. Co., 14 Allen 55 (1867); 98 Mass. 428 (1868). The court intimated that, if such discharge were necessary, the railroad should take and pay for the right by eminent domain.

[93] See *ante*, n. 76.

[94] See *ante*, n. 77.

[95] White *v.* Chapin, 12 Allen 516 (1866); Rathke *v.* Gardner, 134 Mass. 14 (1883).

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Thus, the public authorities may prevent surface water from flowing from the premises of an abutter on to the highway.[96] They may also turn surface water on to the premises of an abutter without liability in tort.[97] Even if the water be gathered into gutters or channels, there is no tort liability, if these overflow upon the premises of an abutter,[98] so long as the water is not cast thereon in a definite channel. Indeed, it has been held that tort will not lie where surface water is drained into a cesspool within the limits of the highway and thence percolates or overflows into the cellar of an abutter.[99] It is not quite clear, however, whether these cases rest upon the ground that no common-law right of the abutter is infringed or upon the ground that there is a remedy by statute.[100] The statute makes liberal provision for damages due to laying out [101] and repairing [102] ways, and there is a special enactment with regard to the wash from ways.[103] Several of the cases which deny a remedy in tort intimate that there may be a remedy under the statute.[104] It may be that these cases go no farther than to hold that the plaintiff has mistaken his remedy. But even in that aspect they do not affirmatively indicate that the common-law right of the public with respect to surface water in the streets is any less than that of the abutter, while there are intimations that no common-law right of the abutter is infringed.[105]

On the other hand, the public authorities may not gather the surface water on the highway into a channel and turn the channel

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[96] Keith *v.* Brockton, 136 Mass. 119 (1883); Dickinson *v.* Worcester, 7 Allen 19 (1863).

[97] Turner *v.* Dartmouth, 13 Allen 291 (1866); Flagg *v.* Worcester, 13 Gray 601. (1859).

[98] Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327 (1890); Hewett *v.* Canton, 182 Mass. 220, 65 N. E. 42 (1902).

[99] Kennison *v.* Beverly, 146 Mass. 467, 16 N. E. 278 (1888); Barry *v.* Lowell, 8 Allen 127 (1864).

[100] See *ante*, n. 44–54.

[101] R. L., c. 48, §§ 13–15; as to state highways, see R. L., c. 47, § 9; as to town ways, see R. L., c. 48, § 68.

[102] R. L., c. 51, § 15.

[103] R. L., c. 51, § 12, and see *post*, n. 109–112.

[104] See *ante*, n. 97–99.

[105] See Flagg *v.* Worcester, 13 Gray 601 (1859); Turner *v.* Dartmouth, 13 Allen 291 (1866); Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327 (1890); Kennison *v.* Beverly, 146 Mass. 467, 16 N. E. 278 (1888).

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upon the abutter.[106] It is true that in *Flagg* v. *Worcester*[107] it was held that there was no liability in tort for digging a gutter in the highway and opening it within the limits of the highway into a culvert constructed for the private drainage of the abutters. But in that case the channel which led to the plaintiff's premises was not constructed by the public authorities. Moreover, the court intimates that, if the acts in question were done in repairing the highway, the remedy was under the statute. Perhaps the fact that the culvert ran under the highway made the case resemble the decisions which hold that a certain amount of surface water may be cast in a stream into a watercourse.[108] Moreover, in *Daley* v. *Watertown*[109] it was held that tort would lie where the town, by license from one Coolidge, gathered surface water into a definite channel and conducted it into a pond which overflowed to the damage of the plaintiff. The latter case seems conclusive against any common-law right of the authorities to turn water in a stream upon the land of an abutter.

But the authorities may gather surface water into a definite channel and conduct that channel within the limits of the highway without incurring tort liability to the abutter. Where the public authorities dug a watercourse within the limits of the highway, an abutter who was thereby incommoded could not maintain an action of tort.[110] And where highway surveyors, acting within the scope of their authority, dug a watercourse in the highway, evidence that they acted from malicious motives was held to be immaterial.[111] Again, where a natural watercourse rises within the limits of the highway and lower riparian owners consent to its diversion, the stream may be carried in front of plaintiff's property in an open ditch.[112] In all these cases the remedy of the plaintiff, if any, is under the statute,[113] which makes special provision for dealing with the wash in ways.[114]

[106] Franklin *v.* Fisk, 13 Allen 211 (1866); Daley *v.* Watertown, 192 Mass. 116, 78 N. E. 143 (1906). See also Collins *v.* Waltham, 151 Mass. 196, 24 N. E. 327 (1890); Westcott *v.* Boston, 186 Mass. 540, 72 N. E. 89 (1905); Smith *v.* Gloucester, 201 Mass. 329, 87 N. E. 626 (1909).

[107] 13 Gray 601 (1859).

[108] See *ante*, n. 55–62. *Cf.* n. 63–71.

[109] 192 Mass. 116, 78 N. E. 143 (1906).

[110] Elder *v.* Bemis, 2 Metc. 599 (1841).

[111] Benjamin *v.* Wheeler, 8 Gray 409 (1857); 15 Gray 486 (1860).

[112] Nealley *v.* Bradford, 145 Mass. 561, 14 N. E. 652 (1888).

[113] R. S., c. 25, § 5; G. S., c. 44, § 10; P. S., c. 52, § 12; R. L., c. 51, § 12.

[114] *Ante*, n. 110–112.

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It has been already shown that tort will not lie where the public authorities turn surface water from a highway upon an abutter unless the water be gathered in an artificial channel. But the highway statute makes liberal provision for those injured by public work in respect of highways.[115] Injury due to surface water has been held a proper element of such damage. Thus, in *Walker* v. *Old Colony R. R. Co.*,[116] it was held that injury due to surface water might be recovered under the railroad statute.[117] And where a statute gave damages to "any person injured in his property,"[118] by reason of the removal of obstructions in Stony Brook, it was held that injury caused by the removal of culverts might be recovered, even though no common-law right of the petitioner had been infringed.[119] These cases indicate the liberal spirit in which such acts are construed.[120]

The precise case has arisen under that section of the statute which gives damages for injury resulting from *repairs*[121] in ways. In *Woodbury* v. *Beverly*[122] a petition was brought for damages under P. S., c. 52, § 15, and evidence was offered that by reason of the repairs the wash from the streets was cast upon petitioner's property and that surface water was prevented from escaping therefrom, and the court, over respondent's objection, permitted the case to go to the jury upon these points. In holding this ruling was proper, Morton, J., said (p. 248):

"If the repair causes surface water to flow or remain upon premises where it did not flow or remain before, and such premises are thereby rendered damp, wet, unhealthy and less valuable than before, the landowner certainly 'sustains damage in his property' by reason of the repair. It is none the less a damage because resulting from surface water which the action of the town in the repair of its way has caused to flow or remain on the premises of the landowner."

In view of this case it is probable that a similar liberal construction will be given to the section[123] which gives damages for laying out

[115] See NICHOLS, LAND DAMAGES, chs. iii, iv. See also *ante*, n. 50–54.

[116] 103 Mass. 10 (1869).

[117] G. S., c. 63, §§ 21, 22.

[118] *Cf.* R. L., c. 48, §§ 13, 68, and R. L., c. 51, § 15.

[119] Boston Belting Co. *v.* Boston, 152 Mass. 307, 25 N. E. 613 (1890); 183 Mass. 254, 67 N. E. 428 (1903).

[120] See *ante*, n. 50–54, 115.

[121] P. S., c. 52, § 15, now R. L., c. 51, § 15.

[122] 153 Mass. 245, 26 N. E. 851 (1891).

[123] R. L., c. 48, §§ 13–15. As to town ways, R. L., c. 48, § 68.

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of ways which is manifestly *in pari materia*, with the section here construed.[124]

One further question must be considered, though the authorities in regard to it are rather hazy. We have seen that the public authorities must make provision for natural water courses, and have no inherent right to gather water into a stream and cast it upon the abutter. Also the public authorities are confined within the limits of the highway location.[125] How far may the public authorities upon payment of compensation "take" a right to interfere with natural streams or to collect water into a stream and cast it upon the abutter as an incident to laying out or relocating the highway? The cases intimate that under present statutes the power of the public authorities is exhausted when the highway is located, and that there is no power to take additional easements in land beyond the limits of the location for the benefit of the highway.[126] None of the cases last cited[126] deals with the disposition of waters by the public authorities. On the other hand the legislature may confer power to deal with natural streams,[127] and it would seem might authorize the creation and disposition of artificial streams. It has likewise been intimated that a railroad corporation might in case of necessity and upon payment of compensation have incidental power to discharge water in a stream upon land not taken.[128] Conceivably this principle might be extended to the public authorities who are charged with the duty of laying out ways, though this seems very doubtful.[129] In the absence of express decision the solution of the problem seems to lie in legislative enactment.

The cases then point to the following conclusions:

1. When a highway is laid out across a natural watercourse, a bridge or culvert sufficient to accommodate the natural flow of the stream must be provided and maintained by the public; but

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[124] See also n. 50–54, 116, 119.

[125] Preston *v.* Newton, 213 Mass. 483, 100 N. E. 641 (1913). See also n. 10 and 11.

[126] Preston *v.* Newton, 213 Mass. 483, 100 N. E. 641 (1913); Doon *v.* Natick, 171 Mass. 228, 50 N. E. 616 (1898); Simonds *v.* Walker, 100 Mass. 112 (1868).

[127] See n. 23, 39, 44, 64–66.

[128] Curtis *v.* Eastern R. R. Co., 9 Allen 55 (1867); Babcock *v.* Western R. R. Corp., 9 Metc. 553 (1845).

[129] See n. 126, 106.

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provision need not be made at that time for extraordinary freshets or for subsequent changes under public authority.

2. When a natural watercourse crosses the highway, surface water may be gathered into a stream and cast therein without liability in tort for increasing the flow of the stream or for pollution, unless the increase or pollution is so great as to constitute a nuisance; but the cases intimate that there may be a remedy in damages under the statute.

3. Tort does not lie for turning surface water from the highway upon an abutter unless the water be turned upon him in a definite channel, nor will tort lie for overflow or percolation of surface water from gutters or cesspools; but it has been held that there is a remedy under the statute when such injury is caused by repairs in the highway, and it seems probable that a similar construction will be given to other damage sections of the highway statute.

4. Where a statute authorizes certain acts, equity will not restrain them nor will tort lie for them; instead, recovery must be sought in the manner prescribed by the statute, although there may be a remedy in tort if the powers conferred be exercised negligently or improperly. In theory this distinction may be clear, but in practice the precise line of demarcation is very difficult to determine. As a practical matter, the safe procedure is to bring both a petition for damages under the statute and an action of tort and then try both cases together. This was done in *Boston Belting Co.* v. *Boston*, *supra*, 119.

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BOSTON, MASS.

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or less credibility of the parties."[124] "Let him fully consider the nature of truth, the state of the case, and of his own person; and, next, the witnesses, the place, the mode, and the time; firmly adhering to all the rules of practice," says Manu.[125] In certain cases of a quasi-criminal character where there was not sufficient evidence to enable the king to come to a decision, proof by ordeal (*Dei judicium*) was directed,[126] and this form of trial, like the penalties of banishment and forfeiture,[127] was carried to northern Europe by the migrating Aryan tribes and introduced into England by the Saxons. Indeed, throughout the Hindu law we meet practice after practice bearing out the theory of which M. Gibelin is one of the greatest exponents, that as descendants of a common ethnic stock, the Teutons, Greeks and Romans retained many original Aryan customs, and that Indo-Sythe is the true *"patrie du droit."*

Certain it is that there is no study more interesting or profitable in the whole realm of comparative law than the Sacred Institutes of the Hindus, for as Savigny said of Roman law, they bind our juristic thought on the one side to a magnificent past, and bring us a better knowledge of the principles which still regulate the legal life of vast millions of people with whom we are thereby brought into a connection wholesome both for them and for ourselves.

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[124] *Digest of Hindu Law*, bk. 2, ch. 2, § 52.

[125] *Ibid.* bk. 2, ch. 4, § 68.

[126] *Ibid.* bk. 2, ch. 1, § 12. Trial by ordeal was extensively practiced in Scandinavia, and formed part of the law of England until 1215, when it was discontinued in consequence of a degree of the Lateran Council.

[127] *Ibid.* bk. 3, ch. 2, § 15.

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Edwin H. Abbot Jr

# LEASES AND THE RULE AGAINST PERPETUITIES

EDWIN H. ABBOT, JUNIOR
of the Boston Bar

## I

### INTRODUCTION

The purpose of this article is to consider the application of the rule against perpetuities to leases. A leasehold estate has certain peculiarities which distinguish it, as a practical matter, from other estates in land. At common law it required no livery of seisin, and so could be created to begin *in futuro*. Although it is not an estate of freehold the duration of the estate may be practically unlimited—it may be for 999 years or even in perpetuity. The reversion after an estate for years is necessarily vested, no matter how long the term of the lease may be, yet the leasehold estate is generally terminable at an earlier time upon numerous conditions subsequent, defined in the lease. In other words the leasehold estate determines without condition by the effluxion of the term defined in the lease but such termination may be hastened by the happening of one or more conditions. The application of the rule against perpetuities to such an estate presents special problems. The purpose of this article is to consider the application of the rule to the creation, termination and renewal of leases; and also its effect upon options inserted in leases.

## II

### CREATION

A leasehold estate may be created to begin *in futuro,* since livery of seisin was not at common law required for its creation. Unless limited by the rule a contingent lease might be granted to begin a thousand years hence. But the creation of a contingent estate for years to begin a thousand years hence is for practical reasons just as objectionable as the limitation of a contingent fee to begin at such a remote period by means of springing or shifting uses, or by the device of an executory devise. It is not surprising therefore that the rule against perpetuities has been held to apply to the original creation of contingent estates for years, and to prohibit their creation at a period too remote.[1]

[1] *Hope v. Gloucester* (1855) 7 DeG. M. & G. 647; *Redington v. Browne* (1893) L. R. 32 Ir. 347; *Johnson v. Preston* (1907) 226 Ill. 447.



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In *Hope v. Gloucester*,[2] certain lands were conveyed by C. in 1529 by deed to the Corporation of Gloucester, the rents to be applied to a charity, and the city covenanting that it would from time to time, when and as a certain farm should become vacant, grant a lease thereof for 31 years at a certain rent to such one of the heirs of the body of B. as should then request such lease. This covenant the city observed for over 300 years, and until the expiration of a lease granted in 1815. At the expiration of that lease a person within the description of the indenture demanded a lease which was refused, whereupon he brought this bill for specific performance which was resisted upon the ground that the covenant was unenforceable specifically under the rule against perpetuities. This defense was sustained, the court deciding that a perpetual covenant to grant successive terms of 31 years to such one of the heirs of the body of B. as should first apply therefor violated the rule and was unenforceable specifically.

A similar result was reached in *Attorney Gen. v. Greenhill*,[3] in which it was held that a gift of lands to a charity with a perpetual direction to lease to kindred of the grantor was good so far as the gift was concerned, but that the direction with respect to leasing was void as a perpetuity.

So also in *Redington v. Browne*[4] a lease for three lives or 99 years, whichever should be longest, was granted on May 1, 1798. In 1814 while this term was still existent the reversioner covenanted that *at the expiration of the prior lease* he would grant a further lease for three *unspecified* lives. This was a bill in equity to enforce that covenant, to which the rule against perpetuities was urged as a defense. The court intimated that a present grant of an estate for years to take effect at the expiration of a present term for 99 years would not, if in all respects vested, violate the rule, but held that the estate created by the present covenant was not of that character since the nomination of the lives and so the *period* of the estate might not be determined until a period too remote.

In *Johnson v. Preston*[5] a will devised certain real estate in trust to hold for the term of 25 years "from and after the probate of this will."

It was held that this devise was void under the rule since the will might not be probated within 21 years of the testator's death and so the event on which the estate was to begin might not happen within that time.

It may, however, be observed that in all these cases some essential element of the estate for years would not necessarily be determined within the period of the rule. In *Hope v. Gloucester* the lessee might

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[2] 7 DeG. M. & G. 647.
[3] (1863) 33 Beav. 193, 9 Jur. N. S. 1307.
[4] L. R. 32 Ir. 347.
[5] 226 Ill. 447.

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and indeed could not be so determined; in *Redington v. Browne* the lives by which the term was to be measured, and so the term itself, remained uncertain; in *Johnson v. Preston* the starting point of the term might not be ascertained within the required period. In all these cases, therefore, the leasehold remained contingent and so within the strict letter of the rule.

A more difficult case is that in which a definite term for years is granted to a definite person to begin without any contingency at a period beyond the ordinary limits of the rule—for example, a term for 50 years to A. to begin 50 years hence. Here the term and the lessee are ascertained exactly and without contingency, although the term is not to take effect for 50 years from date. On this point the writer has found no direct authority. It may be urged that A. has *in praesenti* not a strictly vested estate but a mere *interesse termini*,[6] and therefore does not strictly satisfy the rule. But this argument is at best a technical one. The situation may be met and overcome if the owner of the property convey to a straw man who immediately reconveys to the grantor for 50 years, remainder to A. for 50 years, remainder in fee to the grantor. Here all the estates are vested and so not obnoxious to the rule. If this be so it is difficult to see why the term to A. may not be directly created without the intervention of the straw man. For practical purposes A.'s term is vested in either case. The only effect of invoking the rule is to prohibit the direct creation of a term to take effect without contingency 50 years hence, although the result may be attained by utilizing a straw man and a somewhat more elaborate procedure.

A slightly different case tends to sustain this view. Suppose a lease for 99 years has been granted to A. and that thereafter the reversioner grants another lease to B. to take effect at the expiration of the 99 year lease. According to an intimation in *Redington v. Browne, supra,* this would be good. Indeed the argument to support this view seems unassailable. The reversion after the 99 year term is vested and so not obnoxious to the rule. The reversioner might therefore convey the fee, subject to the lease, to B. If so he may clearly carve out any lesser vested estate—as an estate for years or for life or in tail—to take effect at the expiration of the 99 year lease. The situation is in no way different from that which would have existed had the original lessor leased to A. for 99 years, with remainder for 50 years or for life or in tail to B. Plainly if such vested estates, limited to take effect at the expiration of the 99 year lease, might have been originally created, they may subsequently be created by the reversioner by a separate instrument. Nor does this conclusion conflict in any way

[6] Gray, *Perpetuities* (3d ed. 1915) s. 71; Hall, *Landlord & Ten.* 16. See *Barwick's Case* (1597) 5 Co. 93 *b*, 94 *b*; *Weld v. Traip* (1859, Mass.) 14 Gray, 330.

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with the actual decision in *Redington v. Browne*.[7] In that case the extent of the additional term was not to be determined until a period too remote, so that there could be no vesting of the estate within the period of the rule.

## III

### TERMINATION

Although a lease may be given for an unlimited term or even in perpetuity,[8] the reversion is clearly not obnoxious to the rule,[9] since it is a vested interest. Indeed the reversion is never out of the lessor. Thus in *Sioux City, etc. Co. v. Trust Co.*[10] the Sioux City Co. made a lease of its property for 100 years to another company, and subsequently mortgaged its reversion and rights under the lease to secure an issue of bonds. On foreclosure it was urged that both lease and mortgage violated the rule. It was held that since the reversion after the 100 year lease was vested it was not within the rule. So also in *Redington v. Browne*[11] it was intimated, though not actually decided, that the reversioner after a 99 year lease had a vested interest out of which he could grant a further vested term for years. Indeed the large number of cases[12] which sustain covenants for renewal inserted in leases for terms of more than 21 years necessarily involve a recognition that the lessor still possesses a vested interest out of which the renewal term may be carved. In a word there seems no escape from the conclusion that the reversion after a lease, no matter how long the lease may be, is a vested interest not obnoxious to the rule.

Curiously enough this point was overlooked in *Hanley v. Kansas & T. Coal Co.*[14] which on this point is not to be supported. In that case W. devised lands to C. in fee in trust for Mariah Woolage and her descendants for 200 years, the remainder in fee to vest at the expiration of that time in the county in which the lands should then be situated. The trustee declined the trust. The plaintiffs (descendants of Mariah Woolage, who had died intestate) filed their bill alleging that defendant had wrongfully seized the lands and praying that title

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[7] L. R. 32 Ir. 347.

[8] *Atkinson v. Orr* (1889) 83 Ga. 34; *Cook v. Bisbee* (1836, Mass.) 18 Pick. 527; *Delhi School Dist. v. Everett* (1883) 52 Mich. 314; *Folts v. Huntley* (1831) 7 Wend. 210; *Lewis v. Effinger* (1858) 30 Pa. St. 281.

[9] *Sioux City Co. v. Trust Co.* (1897, C. C. A. 8 C.) 82 Fed. 124; *Redington v. Browne*, L. R. 32 Ir. 347; Gray, *Perpetuities*, ss. 209, 210.

[10] See *supra*, note 9.

[11] See *supra*, note 9.

[12] Gray, *Perpetuities*, ss. 209, 210; *Sioux City Co. v. Trust Co.* (1897, C. C. A. 8 C.) 82 Fed. 124; *Redington v. Browne*, L. R. 32 Ir. 347.

[13] See *post*, sec. IV.

[14] (1901, C. C. W. D. Ark.) 110 Fed. 62.

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be quieted in them. The defendant demurred. The court held that the gift of the remainder in fee to the county was a contingent gift which was void under the rule; that the equitable if not the legal fee was *in the plaintiffs;* but that a bill to quiet title could not be maintained by persons out of possession. This case seems right in holding the gift over to the county contingent and void, since the county entitled to take would not be ascertained for 200 years; it seems wrong, however, in holding that the fee was in the plaintiffs, since if the gift to the county be held void, there was a reversion in fee in the heirs of the devisor, and as this reversion vested at the devisor's death it would not be obnoxious to the rule. This phase of the case seems to have been overlooked by the court.

Yet the status of the reversion or vested remainder after a lease for a term of more than 21 years is somewhat peculiar. It must come in by effluxion of time and without contingency at the expiration of the term. On the other hand most leases contain covenants in the nature of conditions to be performed by the lessee—such as to pay rent, to pay taxes, to repair, not to assign or underlet, etc. If the covenant be violated and so the condition be broken, the reversioner or remainderman as the case may be may enter and terminate the lease, thus accelerating the reversion or remainder. While the *vesting* of the reversion or remainder is not dependent upon any condition, the lessee's estate is subject to conditions subsequent which may terminate it prematurely and bring in the remainder or reversion. Thus where the lease is for a period greater than 21 years the lessee's estate is subject to conditions subsequent which as to that estate might conceivably be deemed too remote, while the lessor's estate, which may be accelerated by the happening of those conditions, is still vested whether they happen or not.

It might be urged that the validity of such conditions should be determined with reference to their effect upon the *lessee's* estate. If so they would on principle be held bad if inserted in any lease for a term of more than 21 years. But this contention has never been raised or decided in any case known to the writer. Moreover, that contention seems contrary both to common sense and to justice. So long as the law permits the creation of terms for more than 21 years, there seems to be no reason to prohibit making such leases subject to conditions subsequent which may lawfully be attached to terms of less length. It would certainly be astonishing if a court should decide that a lessee for 20 years could be evicted for nonpayment of rent, but that this could not be done if the lease were for 22 years. Payment of rent is usually of the very essence of the transaction. The rule is essentially a rule of public policy. It can scarcely be that in such a case any public policy requires protection of the defaulting tenant at the expense of his landlord. If it were necessary, the rule *cessante ratione, cessat ipsa lex* might well be applied.

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It is not, however, necessary to go so far as this. Viewed from the standpoint of the *lessor's* estate, the condition is in no way obnoxious to the rule, since that estate is vested. The happening of the condition does not vest the landlord's estate; it merely accelerates his taking possession by right of an estate which is vested whether the condition has happened or not. Moreover the landlord's right of entry may be sustained in this country by the mass of authorities which have upheld rights of entry for condition broken contained in conveyances in fee,[15] although without consideration of the rule. For all these reasons it would seem that the contention cannot be sustained that a right of entry reserved in a lease for more than 21 years is bad.

## IV

### RENEWAL

It is of course clear that the fact that a lease for more than 21 years may, by agreement of the parties then interested, be extended or renewed at a remote period, does not affect the present validity of the lease.[16] Suppose, however, that a lease for over 21 years contains a covenant for renewal at the option of the lessee. Or suppose such a lease contains a covenant for a perpetual series of such renewals. It has been argued that such a covenant is incident to a present vested interest in the lessee, may be regarded as a part thereof and so, if sustained, furnishes no exception to the rule. But this argument is difficult to support. The question whether the option to renew will ever ripen into a further term depends on the will of the lessee. Until the option is exercised the additional term cannot be said to vest in any strict sense. If therefore the option may be exercised, and the actual vesting of the additional term may take place at a period beyond the limits of the rule, there seems no escape from the conclusion that such option if sustained does form an exception to the rule.

There seems to be no question, however, that such an option is good. It has been consistently sustained for over 200 years in England.[17]

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[15] Gray, *Perpetuities*, ss. 305-311, where the cases are collected.

[16] Gray, *Perpetuities*, s. 230 *et seq.*

[17] *Bridges v. Hitchcock* (1715, H. L.) 5 Bro. P. C. 6; *Ross v. Worsop* (1740, H. L.) 1 Bro. P. C. 281; *Furnival v. Crew* (1744) 3 Atk. 83, aff'd. H. L.; *Atkinson v. Pillsworth* (1787, Ir.) 1 Ridg. App. 449; *Palmer v. Hamilton* (1793, Ir.) 2 Ridg. App. 535; *Rawstorne v. Bentley* (1793, Ch.) 4 Bro. Ch. 415; *Taylor v. Stibbert* (1794) 2 Ves. Jr. 437; *London v. Mitford* (1807) 14 Ves. Jr. 41, *semble; Brown v. Tighe* (1834) 2 Cl. & F. 396, *semble; Dockrill v. Dolan* (1841) 3 Ir. Eq. 552; *Sheppard v. Doolan* (1842) 3 Dr. & War. 1; *Copper Mining Co. v. Beach* (1823) 13 Beav. 478; *Hodges v. Blagrave* (1853) 18 Beav. 404; *Hare v. Burges* (1857) 4 Kay & J. 45; *Pollock v. Booth* (1875) Ir. R. 9 Eq. 229; aff'd. *ibid.* 607; *Nicholson v. Smith* (1882) 22 Ch. D. 640.

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The great weight of authority in this country is to the same effect.[18] The single case which the writer has found *contra*[19] rests on statute. Moreover such a covenant is enforceable in equity,[20] and runs with the land.[21]

It is true that in most of the English cases cited there is no discussion of the rule. In *Bridges v. Hitchcock*,[22] which was a bill in equity by the assignee of the lessee specifically to enforce the covenant to renew against the lessor, it was objected that the covenant tended to a perpetuity, but the objection was overruled and the covenant was specifically enforced. In the other cases the point seems not to have been considered. It is, however, conceded that either as an exception to the rule or in spite of it such covenants are valid in England.[23] Moreover several of the American cases do expressly consider the validity of such covenants under the rule and uphold them none the less.[24] But whether the rule be actually discussed or not, the mere weight of decision seems sufficient to establish the result.[25]

This apparent exception to the rule may well be justified on grounds of common sense. There seems to be no legal objection to a long lease with a right in the lessee to terminate it at his election either at the expiration of fixed periods or at any other time. Such termination merely brings in the reversion or the vested remainder of the person who holds the next estate. Furthermore as the termination is entirely in the hands of the lessee, it would seem unobjectionable in any case. It is true that here the lessee has an estate which is unquestionably vested, and so not obnoxious to the rule, whereas in the case of the option to renew he has merely a contingent right to extend his present vested interest. From the point of view of strict legal reasoning this is perhaps a real distinction. But for practical purposes it is of little worth. In either case the continuance of the lessee's estate depends

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[18] *Banks v. Haskie* (1876) 45 Md. 207; *Boyle v. Peabody H. Co.* (1877) 46 Md. 623; *Blackmore v. Boardman* (1859) 28 Mo. 420; *Diffenderfer v. Board* (1894) 120 Mo. 447; *Drake v. Board* (1907) 208 Mo. 540; *Robinson v. Beard* (1893) 140 N. Y. 107; *Gomez v. Gomez* (1895) 147 N. Y. 195; *Hoff v. Royal M. F. Co.* (1907) 117 App. Div. 884; aff'd. 189 N. Y. 555; *Thaw v. Gaffney* (1914, W. Va.) 75 W. Va. 229, 83 S. E. 983.

[19] *Morrison v. Rossignol* (1855) 5 Cal. 64.

[20] See cases cited in notes 18 and 19, *supra*.

[21] *Blackmore v. Boardman* (1859) 28 Mo. 420; *Furnival v. Crew* (1744) 3 Atk. 83; *Taylor v. Stibbert* (1794) 2 Ves. Jr. 437; *Dockrill v. Dolan* (1841) 3 Ir. Eq. 552. And see cases cited in notes 18 and 19, many of which were between assignees.

[22] (1745, H. L.) 5 Bro. P. C. 6.

[23] See *London & S. W. Ry. v. Gomm* (1882) 20 Ch. D. 562, 579; *Woodall v. Clifton* [1905] 2 Ch. 257.

[24] *Banks v. Haskie* (1876) 45 Md. 207; *Blackmore v. Boardman* (1889) 28 Mo. 420; *Thaw v. Gaffney* (1914, W. Va.) 83 S. E. 983.

[25] See Gray, *Perpetuities*, ss. 305-311 concerning the similar situation in American courts as to the validity of a right of entry in a conveyance in fee.

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on the lessee. Strict application of the letter of the rule would sustain one method of reaching the given result while disapproving of the other. It would mean merely a change in the form or the lease so as to permit the lessee to end a long term instead of to extend a short one. The rule is essentially a practical rule grounded on public policy. If the result may be reached without violating either the letter of the rule or the public policy on which it rests, an apparent exception which permits the result to be attained in a way which at most violates only the letter of the rule may well be sustained.

## V

### OPTIONS TO PURCHASE THE FEE INSERTED IN LEASES

Suppose that in a lease for more than 21 years the lessor covenants that the lessee at his option may purchase the fee at any time during the term. Is this option valid? The cases generally agree that if an option *in gross* to purchase back the fee, exercisable beyond the period of the rule, be inserted *in a conveyance in fee,* such option will not be specifically enforced in equity, since specific enforcement would in effect create a contingent estate which would violate the rule.[26] If therefore the letter of the rule is to be blindly applied, a similar covenant contained in a lease cannot be sustained. On the other hand leases are to some extent *sui generis*. Covenants for renewal contained in leases for over 21 years are sustained by authority. They may be supported on principle on the ground that they do not violate the policy of the rule even though they conflict with its letter. The question therefore is whether an option to purchase the fee, inserted in a lease for over 21 years, and exercisable at any time during the term, may be sustained as an exception to the rule, on the ground that it does not conflict with the policy on which the rule rests.

The policy behind the rule is undoubtedly to prevent one owner from unduly and unreasonably diminishing the value of ownership to his successors. The same policy also lies behind the companion rule—the rule against restraints on alienation—which prevents undue restriction of the right of alienation, which is one of the most valuable incidents of ownership. Property—especially real property—endures, while owners are ephemeral. Even an owner in fee is in a sense only a tenant for life with power of disposition. When in 1620 executory devises which would cut short vested interests were held to be

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[26] *London & S. W. Ry. v. Gomm* (1881) 20 Ch. D. 562; *Trevelyan v. Trevelyan* (1885) 53 L. T. N. S. 853; *Winsor v. Mills* (1892) 157 Mass. 362; *Barton v. Thaw* (1914) 246 Pa. St. 348; *Starcher v. Duty* (1907) 61 W. Va. 373, 56 S. E. 527; *Woodall v. Bruen* (1915) 76 W. Va. 193, 85 S. E. 170; Gray, *Perpetuities,* s. 330.

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indestructible,[27] this power of disposition was enormously increased. Unless restrained by law, any given owner might, by the creation of these indestructible contingent interests, practically deprive his inevitable successors of all the benefits of ownership throughout an indefinite future. So long as the present estate may be cut short at any moment a large part of its value either for use or sale is gone. As a practical matter no one will either buy or efficiently improve a property which he may lose at any moment upon the happening of a contingency beyond his own control. Public policy clearly required an antidote for this situation. That antidote was the rule against perpetuities[28] and its companion, the rule against restraints on alienation.[29]

Is there a real and practical distinction between an option in gross to purchase the fee, and an option to purchase the fee attached to a leasehold and exercisable only during the term? In the opinion of the writer there is. An option in gross exercisable at a remote period hangs over and threatens *the present estate in possession.* It operates as a practical clog on development and alienation alike, since present possessor and possible purchaser have a tenure dependent on the caprice of a third party. Neither objection applies to an option to purchase attached to and exercisable during a presently vested term for years. In the first place the option is in aid of the estate *of the party in possession* and therefore encourages him to develop that estate to its utmost capacity. In the second place it is not a serious detriment, if indeed any detriment at all to the reversion. The reversioner has in effect transformed his estate into a present right to receive rental from time to time and an ultimate right to receive the property back. Its value is measured to a considerable extent by that rental. It is but a short step to commute the recurring payments of rental into a single cash payment in full. In a word the business reasons which render a remote option *in gross* extremely injurious to an estate in fee do not apply if the option be attached to a presently vested term for years. Such an option neither retards development nor places the reversion *extra commerciam.*

There are strong business reasons why such an option should be permitted in leases for over 21 years. In the first place such an option is frequently inserted in leases for less than that period—where no

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[27] *Pells v. Brown* (1620) Cro. Jac. 590. See Gray, *Perpetuities,* ch. V for the origin and history of the rule.

[28] For the somewhat illogical and empiric manner in which the rule was developed, see Gray, *Perpetuities,* ch. V.

[29] The two rules are entirely distinct as Gray points out. Gray, *Perpetuities,* ch. VII. One prohibits the creation of remote future interests. The other forbids specific restraints on alienation beyond certain limits. See generally Gray, *Restraints on Alienation.* But both are the expression of public policy intended to protect each successive owner from unwarrantable clogs imposed by his predecessors.

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possible objection can be made under the rule. In the second place long leases are frequently made of unimproved property, the lessee to improve at his pleasure. It is extremely desirable that the parties to such leases should be able to fix in the lease their rights at the termination of the lease. Broadly speaking, there are only four possibilities: (1) to permit the lessee to buy out the lessor; (2) to permit the lessee to require the lessor to pay to him the then value of the improvements; (3) to vest the improvements in the lessor without payment, on the ground that they are incorporated in the real estate; (4) to permit the lessee to remove them so far as he can. The last two are for business reasons undesirable since they inevitably tend to the depreciation of the estate at the end of the term. The first two are equally open to objection, if specifically enforced, under the letter of the rule against perpetuities. So long as the law permits the creation of leases for a term which may exceed the period of the rule, it seems undesirable to invoke the rule in order to limit the parties in adjusting their rights at the termination of the lease in ways which are common and unobjectionable in shorter leases. In a word the rule was made for man, not man for the rule.

Indeed it may well be urged that public policy is remotely if at all concerned in such a case—once the right to make the long lease is admitted. The question involves the disposition of two estates, each equally vested. Both are ultimately to be gathered into one hand, either that of the lessor or that of the lessee. We have already seen that at any time during the term—whether it is over 21 years or not—the lessor may enter and terminate the lessee's estate for breach of condition. Wherein is it more undesirable that the lessee, by payment of a sum of money at any time during the term, should be able to unite both estates in himself? Indeed such a proceeding bears a strong analogy to the common-law right of the tenant in tail to bar alike the entail and reversion by ~~leaving~~ a fine or suffering a common recovery[80]—a proceeding which has never been held to violate the rule. If there be any weight in this analogy it would seem that so far from frowning on the introduction of the option into long leases, public policy should favor it.

A further argument may be grounded on the fact that leases have been held to be in certain respects an exception to the rule against perpetuities and also to the rule against restraints on alienation. We have already seen that covenants for an indefinite series of optional renewals, or even for an optional renewal in perpetuity, are good.[81] An optional covenant for a renewal in perpetuity is for practical pur-

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[80] In most American states, estates tail are either abolished, or else may be barred by a conveyance in fee by the tenant in tail. And *cf.* also the rights of mortgagor and mortgagee: see Gray, *Perpetuities,* ch. XVI.

[81] See *supra,* sec. IV.

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poses substantially the equivalent of an optional covenant to convey the fee.[82] So also covenants against assignment or underletting are universally sustained without question[83]—a clear exception to the rule against restraints on alienation. If, as has been shown, options to purchase the fee inserted in long leases do not contravene the policy which underlies the rule, that exception to the letter of the rule may well be supported by the analogy of the two other exceptions just noted.

We turn to the authorities, which are few. In *Woodall v. Clifton*[84] it was held that an option to purchase at any time during the term inserted in a lease for over 21 years will not be specifically enforced in equity. But the case was held to be governed by *London & S. W. Ry. v. Gomm*,[85] which decided that an option *in gross* reserved *in a conveyance in fee* was invalid, and the court, without any extended argument, simply refused to follow the analogy of covenants for renewal in leases. *Woodall v. Clifton* has since been followed in *Worthing Corp. v. Heather*,[86] in which, however, the covenant was held good at law and damages for its breach given against the estate of the covenantor. In Ireland a provision by which a perpetual rent charge might at any time be redeemed by payment of a fixed sum was sustained at first, but this decision was later overruled[87] on the authority of the *Gomm* case and the other two English decisions just noted. In passing, it may be suggested that as a provision for relieving the estate from the encumbrance of a perpetual rent charge seems entirely in accord with the policy underlying the rule, this policy might well prevail over the letter. But it must be conceded that in England the letter of the rule has prevailed.

The writer has been able to discover only one American case which in express terms passes on and decides the question. *Hollander v. Central Metal Co.*[88] was a bill in equity to enforce specifically an option to purchase the fee contained in a lease for over 21 years, to which there was a demurrer on the ground that the option was bad under the rule. The case was fully argued and the English cases[89] as well as the authority of Mr. Gray[40] were all cited in support of this latter view. After full consideration the court held the option good, principally upon the ground that even if it conflicted with the letter of the

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[82] Gray, *Perpetuities*, s. 230.

[83] Gray, *Restraints on Alienation*, ss. 101-103.

[84] [1905] 2 Ch. 257.

[85] 20 Ch. D. 562.

[86] *Switzer v. Rochford* [1906] 1 Ir. 399.

[87] *In re Tyrrell's Estate* [1907] 1 Ir. 292; *In re Earl of Donoughmore's Estate* [1911] 1 Ir. 211.

[88] (1908) 109 Md. 131.

[89] See *supra*, notes 34-37.

[40] *Perpetuities* (2d ed.) s. 230.

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rule it was not in conflict with its underlying policy.[41] This case is of unusual interest and authority because it was decided after full consideration of the cases which upheld and followed the letter of the rule.

In addition there is some American authority which has upheld such options inserted in long leases, but without consideration of the rule. Thus in *Prout v. Roby*,[42] specific performance was given of an option to purchase the fee inserted in a lease in perpetuity.[43] And a similar decision was rendered in *Hagar v. Buck*[44] as to a similar option inserted in a lease for 99 years. It is true that in neither of these cases was the validity of the option under the rule specifically considered. Yet since specific performance was granted, the point was of necessity involved in the decision. Moreover the fact that the point was not specifically considered may perhaps be some indication that the result does not conflict with the policy of the rule even if it be contrary to the letter.

Finally if the letter of the rule be still considered a stumbling-block, the results may conceivably be attained by care in drawing the lease. The term of the lease may be made 20 years, with an option to purchase during the term, and a covenant be inserted for an indefinite series of renewal leases, each containing a similar option. We have already seen that covenants for renewal are good.[45] And each renewal automatically creates a new option which is good for the renewal term.[46] Indeed a similar result might possibly be reached by a covenant for renewal in perpetuity upon payment of a specified amount in lieu of all rental. If by either of these methods the result may be reached without violating even the letter of the rule, an exception to its letter may well be made in the case where the option to purchase it attached to a term of over 21 years. Again the question becomes one of form rather than one of substance.

## VI

### VALIDITY AT LAW OF CONTINGENT COVENANTS WHICH MAY NOT BE PERFORMED WITHIN THE PERIOD OF THE RULE

The rule is a rule of property, not a rule of contract. It does not affect the validity *at law* of contingent covenants or contracts which

[41] The local custom of making leases containing such options was undoubtedly a factor in the result.

[42] (1872) 15 Wall. 471.

[43] For *dicta* to the same effect see *Wells v. Savannah* (1901) 181 U. S. 531, 544; *York County Sav. Bank v. Abbot* (1905, C. C. D. Me.) Fed. 988.

[44] (1872) 44 Vt. 285.

[45] *Supra*, sec. IV.

[46] And as we shall see, *post*, sec. VI, the convenant is good at law. But *cf. Starcher v. Duty* (1907) 61 W. Va. 373, 56 S. E. 527. On this point this case is not to be supported, as the successive options are plainly separable. *Cf.* Gray, *Perpetuities*, ch. IX.



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may not be performed within the period of the rule.[47] It is true that specific performance *in equity* may be denied, on the ground that the effect of such performance if granted would be to create remote contingent estates.[48] Yet the covenant or contract is still valid at law, and the covenantor must respond in damages for a breach of it.[47]

The leading case is *Walsh v. Secretary of State for India.*[49] In 1770, Lord Clive transferred £62,000 to the East India Co. under a sealed agreement by the company to pay the interest upon an equal sum in pensions to European officers disabled i[illegible]vice, and in the event that the company should ever cease to [illegible]ploy military officers in its service, to repay an equal sum to Clive or his representatives. In 1858, after the Sepoy Mutiny, Parliament transferred the forces and property of the company to the crown, but subject to the obligations of the company. This was a bill in equity by the then representatives of Clive to compel repayment of the £62,000. It was held that the covenant was valid and enforceable *as a covenant,* though the condition might not happen within the period of the rule.

A very neat illustration of the distinction between the equitable and legal enforcement is furnished by *Worthing Corp. v. Heather,*[50] which was a bill in equity to compel specific performance of an option to purchase the fee inserted in a lease for 30 years, and in the alternative to recover damages against the covenantor for breach of it. The court denied specific performance on the ground that such relief would in effect create a contingent equitable estate which would be too remote, but held the covenant valid at law and entered a decree for damages.[51]* There could be no clearer illustration of the distinction between the contract and the property aspects of the same covenant.

## VII

### CONCLUSIONS

It seems that to some extent leases are subject to the rule and to some extent are an exception to it. The authorities seem to support the following conclusions:

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[47] Gray, *Perpetuities,* s. 329; *Walsh v. Secretary of State* (1863) 10 H. L. 367; *Witham v. Vane* (1883, H. L.) reported in Challis, *Real Prop.* (3d ed.) 440; *Borland's Trustee v. Steel Bros.* [1901] 1 Ch. 279; *Worthing Corp. v. Heather* [1906] 2 Ch. 532.

[48] See *supra,* note 26.

[49] (1863) 10 H. L. 367. It may be noted that the covenant did not require reconveyance of a specific trust estate, but merely payment of a sum equal to the original gift.

[50] [1906] 2 Ch. 532.

[51] *Cf. Winsor v. Mills* (1892) 157 Mass. 362, where specific performance was denied, but performance of the covenant enforced as the condition of equitable relief to the convenantor.

* Eastman Marble Co v. Vermont Marble Co 236 Mass 138 (decided since this article was written) held that such an option reserved in a deed was invalid and would not sus[illegible] an action for damages. Leases were specifically de[illegible]

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1. The rule prohibits the creation of contingent terms for years which may not vest or fail within the period of the rule. On the other hand, a presently vested term limited to take effect absolutely at a time which under the letter of the rule would be remote appears to be good. (a) Mann Crossman & Paulin Ltd v Registrar 1918 1 Ch 207

2. Since the reversion after a term of years, no matter how long, is a vested estate, conditions are valid which accelerate that vested estate, even though they are contingent and not certain to take effect or fail within the period of the rule.

3. Covenants for renewal at the option of the lessee, exercisable at any time during the term, are an exception to the letter of the rule, and are sustained by the great weight of authority, even though the term be so long that the option may be exercised at a time beyond the period of the rule.

4. There is conflict as to the validity of options to purchase the fee at any time during the term, inserted in leases for terms of over 21 years. They certainly conflict with the letter of the rule. In England the letter of the rule prevails and specific enforcement of such options is denied. In this country such authority as there is seems to sustain them. In Maryland specific enforcement has been granted after mature consideration, on the ground that they do not conflict with the policy of the rule. In the Supreme Court of the United States and in Vermont they have been specifically enforced without consideration of the rule. In the opinion of the writer the broader American view should prevail over the letter of the rule, since such options *in leases* do not conflict with the policy of the rule and the result may be attained without conflict with even the letter of the rule by a mere change in form. Similar considerations do not, however, apply to remote options *in gross* attached to a conveyance in fee, which seem to be universally condemned.

5. Since the rule is a rule of property and not a rule of contract, contingent contracts or covenants are good *at law* even though the condition will not happen or fail within the period of the rule. If, therefore, such a covenant be broken, damages at law may be recovered from the covenantor. *

* But not in Mass. where an option exercisable at a period too remote is inserted in a deed in fee
Eastman Marble Co v Vermont Marble Co 236 Mass 139
Leases were expressly distinguished in the Eastman Case. See also Battelle v Worcester 236 Mass 395

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# THE DELEGATION OF LEGISLATIVE FUNCTIONS

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As the interests of our people become more diversified and their industries grow more complex and assume greater proportions and variety of form, the demands upon the government necessarily increase. But add to the remarkable growth in scope and variety of interests possessed by our people to-day as compared with the situation even half a century ago, the increased tendency toward co-ordination and co-operation, not only in private but as between public and private business as well—the passing of the doctrines of *laissez faire* and unrestricted freedom of the individual as axioms of economics and political and legal theory—and we add enormously to the public burden. This is particularly true in matters of legislation; there all these considerations apply directly. In order to legislate intelligently and in detail, the members of Congress individually must know more things and know them more accurately and intimately than is humanly possible. The result has been that Congress has increasingly delegated to others the duty of doings things which in the inception of the government it might well have done itself.

How far may Congress or the state legislature under a state constitution modeled after the federal pattern go in this respect? How far may they delegate to others duties in the laying down of new rules intended to be obligatory upon all who come within their scope? For whenever a new rule of this type has been laid down an act essentially legislative in character has been done.[1]

In the decisions of the courts upon the question of the delegation of legislative functions three things are almost invariably done: First, there is unanimous agreement that legislative powers cannot be delegated by Congress or by the legislature; second, although the judges rely upon the *dicta* of other courts and scarcely analyze the terms used, the delegation is usually permitted; and third, there seems to be a

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[1] Field, J., in dissent, *Sinking Fund Cases* (1879) 99 U. S. 700, 761, 25 L. Ed. 496, 516:

"The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases under it."

*Cf. Taylor v. Place* (1856)4 R. I. 324; *Smith v. Strother* (1885) 68 Cal. 194, 8 Pac. 852.

"Essentially, the promulgation of administrative orders or ordinances is legislative in character." 2 Willoughby, *Constitution*, sec. 742.



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# COVENANTS IN A LEASE WHICH RUN WITH THE LAND

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Assistant Attorney-General, Massachusetts

## I

### PRELIMINARY

The purpose of this article is to consider anew the tests which determine whether a covenant in a lease will run with the land. The subject is by no means novel. The leading case was decided in 1583,[1] if the resolutions promulgated in *Spencer's Case* can be considered a decision. But in view of the seeming conflict between the first and second reso-

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[1] *Spencer's Case* (1583, K. B.) 5 Co. Rep. 16a. The first two resolutions read as follows:

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodammodo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *Warrantia Chartae*, F. N. B. 135, & 9 E. 2. *Garr' de Charters* 30, 36 E. 3. Garr. 1, 4 H. 8. Dyer 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.



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lutions of that case, the doubt as to what the actual decision was,[2] and the conflict which has arisen among cases which purport to follow it, it may not be wholly without worth to see whether later decisions do not enable us to reformulate the tests somewhat more clearly.

The first question is as to just what we mean by a covenant which runs with the land. It is a covenant which is so attached to the land, that the right to enforce it, or the obligation to perform it, passes with the estate conveyed, as an incident of ownership.

There is special necessity for permitting the creation of such covenants in leases. Many of the incidents of a leasehold estate and reversion are executory covenants. At common law one who is not a party to a covenant can neither sue[3] nor be sued[4] directly upon it. The parties to the covenants in a lease are the original lessor and the original lessee. If either convey his estate, his grantee can neither sue nor be sued as a party to the covenant in the lease, unless such covenants pass as an incident of the estate conveyed. But a large part of the value of the lease would disappear unless the direct relation of landlord and tenant be preserved, as between the assigns of the original parties to the lease, by giving to each a remedy upon, and imposing on each an obligation under, the covenants of the lease. To meet this necessity the Statute of 32 Hen. VIII, c. 34, was passed in 1540. This statute has been held to be part of the common law in the great majority of our states.[5]

The point that *privity of estate* is the key to the situation is emphasized by the circumstances under which St. 32 Hen. VIII, c. 34, was enacted. After Henry VIII broke with the Pope he caused the lands of many monasteries to be forefeited to the Crown and subsequently granted them to others. Many of these lands were under lease. By reason of the forfeiture it was impossible to work out even the semblance of an assignment by the lessors of the covenants contained in the leases.

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[2] See *Purvis v. Shuman* (1916) 273 Ill. 286, 294, 112 N. E. 679, 682; *Sexauer v. Wilson* (1907) 136 Iowa, 357, 362, 113 N. W. 941, 943; *Masury v. Southworth* (1859) 9 Ohio St. 340, 350; *Bald Eagle Ry. v. Nittany etc. Ry.* (1895) 171 Pa. 284, 294-5, 33 Atl. 239, 241.

[3] *Sanders v. Filley* (1832, Mass.) 12 Pick. 554; *Johnson v. Foster* (1846, Mass.) 12 Met. 167; *Millard v. Baldwin* (1855, Mass.) 3 Gray, 484; *Flynn v. North American L. Ins. Co.* (1874) 115 Mass. 449; *Thomas v. Hayward* (1869) L. R. 4 Exch. 311; *Tallman v. Coffin* (1850) 4 N. Y. 134; *Hansen v. Meyer* (1876) 81 Ill. 321.

[4] *Boyden v. Hill* (1908) 198 Mass. 477, 85 N. E. 413; *New England etc. Co. v. Rockport Granite Co.* (1889) 149 Mass. 381, 21 N. E. 947.

[5] Sims, *Real Covenants* (1901) 73 *et seq.*; *Scott v. Lunt* (1833, U. S.) 7 Pet. 596, 606; *Sheets v. Selden* (1864, U. S.) 2 Wall. 177, 189; *Howland v. Coffin* (1831, Mass.) 12 Pick. 125, 126; *Patten v. Deshon* (1854, Mass.) 1 Gray, 325, 326; *Carleton v. Bird* (1900) 94 Me. 182, 191, 47 Atl. 154, 156 (*semble*). In some states it has been in substance re-enacted. See Sims, *loc. cit.* See note 9 *infra*.

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Consequently, the grantees of the Crown received lands subject to leases the covenants of which they could not enforce against the lessees because they (the grantees) were not parties thereto.[6] Some remedy was necessary. That remedy was St. (1540) 32 Hen. VIII, c. 34, which provided, in substance, that the grantees of the King and the heirs, executors, successors and assigns of the lessors, should have the same remedies against the lessees, their executors, administrators and assigns, as the lessors would have had, and conversely that the lessees, their executors, administrators and assigns, should have the same remedies against the grantees of the King and the lessors, their heirs, successors and assigns, as the lessees would have had. Thus St. 32 Hen. VIII, c. 34, created, as between lessors and lessees, and their respective heirs, executors, administrators, successors and assigns, an exception to the rule that one who is not a party to a covenant can neither sue nor be sued upon it. Yet it did not create privity of contract between either the lessor or the lessee and an assign of either. The mutuality of remedy conferred by the statute rests upon privity of estate[7] and continues only so long as such privity exists.[8] Thus the need for the relief given by the statute arose out of privity of estate, where privity of contract was lacking, and consequently is confined to the case where privity of estate exists.

It is not without significance that a somewhat similar remedy has been worked out, without the aid of the statute, in two cases where a similar need has arisen. St. 32 Hen. VIII, c. 34, applies to leases only.[9] It does not apply to deeds. Yet the doctrine of covenants running with the land applies to deeds,[10] provided that privity of estate be established,[11] and the intention that the covenant shall run is sufficiently declared.[12] So also where the owner of a business and good will conveys it to another, with a covenant or agreement on his own part not to

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[6] See recitals in (1540) 32 Hen. VIII, c. 34. The statute is reprinted in 2 Gray, *Cases on Real Property* (2d ed. 1905) 321.

[7] Privity of estate is defined as "mutual or successive relationship to the same right of property." *Bigelow v. Old Dominion Copper Co.* (1912) 225 U. S. 111, 129, 32 Sup. Ct. 641, 643.

[8] *Donaldson v. Strong* (1907) 195 Mass. 429, 81 N. E. 267; *Mason v. Smith* (1881) 131 Mass. 510.

[9] It is in force in most of the states of the union either as part of the common law, or by re-enactment. Sims, *op. cit.*, 73 *et seq.* See also *Howland v. Coffin, supra* note 5; *Patten v. Deshon, supra* note 5; *Carleton v. Bird, supra* note 5; *Scott v. Lunt, supra* note 5; *Sheets v. Selden, supra* note 5. It is not in force in Ohio but another statute is held to give the same remedy. *Masury v. Southworth* (1859) 9 Ohio St. 340; *Broadwell v. Banks* (1905, C. C. D. Mo.) 134 Fed. 470, 474.

[10] *Pakenham's Case* (1368) Y. B. 42 Edw. III, p. 3, pl. 14; *Anonymous* (1582) Moore 179, pl. 3; *Morse v. Aldrich* (1837, Mass.) 19 Pick. 449; 15 C. J. 1241.

[11] *Plymouth v. Carver* (1834, Mass.) 16 Pick. 183; 15 C. J. 1238.

[12] *Savage v. Mason* (1849, Mass.) 3 Cush. 500; 15 C. J. 1241.

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establish a competing business to the detriment of the good will so conveyed, both the good will and the covenant or agreement for its protection are in a sense appurtenant to the business conveyed, and a subsequent assignee of the business and good will may enforce the agreement[13] at least in equity. In other words, the covenant or agreement[14] becomes an incident of the business and, in equity at least, in effect runs with it.[15] Thus entirely apart from the provisions of 32 Hen. VIII, c. 34, which applies neither to deeds nor to convenants or agreements for the protection of the good will of a business conveyed, we find that the grantee or assignee has, in equity at least, a remedy upon or an obligation under a covenant or contract to which he is not a party because it touches and concerns property which has passed to him. In both instances a chose in action so inheres in the property that ownership of the property carries with it a remedy upon this executory incident thereof[16] in spite of the rule that title to a non-negotiable chose in action cannot pass by assignment, and the further rule that only parties to an agreement can sue or be sued upon it.

Although at first sight there is a seeming similarity between the running of a covenant and an assignment of it, the two situations are entirely distinct. An assignment of the covenant carries a right to sue in the name of the assignor, or of his personal representative if he be dead.[17] It confers the benefit of the covenant on the assignee without the burden, although of course the assignee cannot recover without proof that the obligations of the assignor have been performed. The

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[13] *California Steam Nav. Co. v. Wright* (1865) 6 Calif. 258; *Swanson v. Kirby* (1896) 98 Ga. 586, 26 S. E. 71; *Hedge v. Lowe* (1877) 47 Iowa, 137; *Klein v. Buck* (1895) 73 Miss. 133, 18 So. 891; *Palmer v. Toms* (1897) 96 Wis. 367, 71 N. W. 654; *Elwes v. Crofts* (1850) 10 C. B. 241; *Jenkins v. Eliot* (1906) 192 Mass. 474, 78 N. E. 431; *Foss v. Roby* (1907) 195 Mass. 292, 81 N. E. 199; *Myott v. Greer* (1910) 204 Mass. 389, 90 N. E. 895; see also *Old Corner Book Store v. Upham* (1907) 194 Mass. 101, 80 N. E. 228; 20 Cyc. 1281, note 36.

[14] In this case the obligation need not be under seal, although in the case of land nothing except a *covenant* will run. *Standen v. Chrismas* (1847) 10 Q. B. 135. There is conflict whether a stipulation which purports to bind the grantee of a deed poll (who seals nothing) can be deemed a covenant by him which will run. *Kennedy v. Owen* (1884) 136 Mass. 199 and cases cited.

[15] See authorities note 13 *supra*.

[16] It must be noted, however, that, in the case of covenants running with the land, a stranger to the title cannot attach an incident to the property. Thus even though the covenant of a stranger touches and concerns the land, it cannot run for want of privity of estate. See note 11 *supra*.

[17] *Thompson v. Rose* (1828, N. Y.) 8 Cow. 266; *Grover v. Grover* (1837, Mass.) 24 Pick. 261; *Foss v. Lowell, etc., Sav. Bank* (1873) 111 Mass. 285; *Pierce v. Boston Sav. Bank* (1880) 129 Mass. 425. Statutes in many states now permit or even require that the suit shall be brought in the name of the real party in interest, but this is merely a change in form and the defendant may maintain against the assignee any defence which he could maintain against the assignor. See *Rogers v. Abbot* (1910) 206 Mass. 270, 92 N. E. 472.

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right of the assignee, therefore, rests upon the privity of contract existing between the assignor and the defendant, and is derivative, not direct. But where the covenant runs by reason of privity of estate, transfer of the estate carries with it the benefit and the burden of the covenant,[18] even though it does not relieve the original covenantor of the burden imposed upon him by privity of contract.[19] Moveover, as we have already seen, the remedy is direct, not derivative. The difference, therefore, is that in the case of an assignment we have a derivative remedy resting upon privity of contract, while in the case of the running of a covenant we have a direct remedy resting upon privity of estate, because the covenant is appurtenant to the estate.

Another class of rights, which superficially resembles covenants which run with the land, is sometimes confused with them. The Chancellor will often compel one who takes property with notice of an equity to respect that equity even though no action at law would lie as against this particular defendant to recover damages. In this class fall a large class of equitable restrictions upon the use of real estate, which may be enforced against those who take with notice of the covenant, even though they do not run with the land.[20] A true covenant which runs with the land, being an incident thereof and appurtenant thereto, would bind even a purchaser for value and without notice of the covenant. So, also, if A, owning real estate or an interest therein, makes a contract in respect of it, and thereafter disposes of it to one who takes with notice, equity may still decree specific performance, not only against the grantor, but likewise against the grantee with notice.[21] But this class of cases rests upon the equitable principle of privity of conscience, not upon the legal principle of privity of estate.

To sum up, therefore, a true covenant which "runs" with the land "runs" by reason of privity of estate. It must be distinguished from assignments, which rest upon a derivative privity of contract, and the equitable principle, which permits enforcement of a lawful contract

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[18] *Northern T. Co. v. Snyder* (1896, C. C. A. 7th) 76 Fed. 34, 36; *Minshull v. Oakes* (1858, Exch.) 2 Hurl. & Norm. 793; *Dyson v. Forster* [1909, H. L.] A. C. 98; *Prout v. Robey* (1872, U. S.) 15 Wall. 471; *Purvis v. Shuman* (1916) 273 Ill. 286, 112 N. E. 679; *Morse v. Aldrich* (1837, Mass.) 19 Pick. 449. Citations might be added almost indefinitely.

[19] *Barnard v. Godscall* (1612, K. B.) Cro. Jac. 309; *Mason v. Smith* (1881) 131 Mass. 510, 511 (*semble*); *Jones v. Parker* (1895) 163 Mass. 564, 568, 40 N. E. 1044, 1045; *Neal v. Jefferson* (1912) 212 Mass. 517, 522, 99 N. E. 334, 335; *Auriol v. Mills* (1790, K. B.) 4 T. R. 94, 99.

[20] The leading case is *Tulk v. Moxhay* (1848, Ch.) 2 Phil. 774. The discussion of this principle is beyond the scope of this article.

[21] *Albiani v. Evening Traveller Co.* (1914) 220 Mass. 20, 107 N. E. 406, and cases cited. Conveyances in fraud of creditors are another familiar example of the same principle.

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against persons who take with notice, which rests upon privity of conscience.

We pass. therefore, to our main problem, namely, what principle governs the running of covenants in leases by reason of privity of estate. This problem, as we shall see, divides into two parts—the question as to what covenants the policy of the law will permit to run, and the question as to what covenants the parties to the instrument intend shall run. As was said in *Masury v. Southworth*:[22]

"From this view, it is obvious that, as to the first point, the nature and character of a covenant which may inhere in the land, we are to look at the reason and policy of the law; and, as to the second point, whether it does so inhere as to give a right and create an obligation in the case of assignees, we must look at the intent of the parties creating the estate. The law must say that the covenant may inhere, and the parties must say that it shall inhere."

## II

### THE TEST FOR COVENANTS WHICH THE LAW PERMITS TO RUN

Taken alone St. 32 Hen. VIII, c. 34, might perhaps be construed broadly enough to apply to almost any covenant which caprice might insert in a lease. It was, however, passed to correct an injustice—the loss by those in privity of estate of the contractual relation which rendered that estate of mutual value. Moreover, the statute was in clear derogation of the then common law. It was, therefore, strictly construed. In spite of the broad language employed, the court resolved in *Spencer's Case*[23] that as a matter of law a covenant in a lease could not run "*if the thing to be done be merely collateral to the land and doth not touch or concern the thing demised in any sort.*" In so construing the statute the court confined it strictly to the mischief which it was enacted to correct.

If performance of the covenant does not "touch or concern the thing demised in any sort" privity of estate in the thing demised furnishes no reason for imposing a mutuality of obligation and of remedy where none previously existed. So far as collateral covenants are concerned, the continuance of the mutual relation to the property does not require a remedy to the covenantee against the successors or assigns of the covenantor. The assign of the covenantee may also be left to such remedy as he may be able to enforce against the covenantor in the name of the covenantee, upon the theory of an actual assignment of the covenant. If once it be determined that performance of the covenant does not "touch or concern the thing demised in any sort," it is plain that

[22] (1859) 9 Ohio St. 340, 348.
[23] (1583, K. B.) 5 Co. Rep. 16a.

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neither success nor failure in enforcing it affects the mutual relation of the assigns to the thing demised. In such a case the mischief which the statute was intended to correct does not exist and the statute may well be restrained by construction so as not to apply.

On the other hand, *Spencer's Case* recognizes that "if the thing to be done" *does* "touch or concern the thing demised" the covenant is one which the law permits to run and to bind assigns. This conclusion is somewhat confused by the seeming conflict between the first and the second resolution and by the further discussion as to the necessity of "express words" to bind assigns in certain cases.[24] But if *Spencer's Case* leaves the matter in any doubt, the point has been established by numerous subsequent decisions.[25] The question, then, becomes what is meant by the requirement that *"the thing to be done"* must *"touch or concern the thing demised."*

*Congleton v. Pattison*[26] was an action at law by the lessor, the Parish of Congleton, against the assign of the lessee upon a covenant whereby the lessee bound himself and his assigns not to employ workers from other parishes upon the demised premises. The defendant demurred. In sustaining the demurrer Lord Ellenborough said:

> "This is a covenant in which the assignee is specifically named; and though it were for a thing not *in esse* at the time, yet being specifically named, it would bind him *if it affected the nature, quality or value of the thing demised, independently of collateral circumstances;* or if it *affected the mode of enjoying it*"[27] (italics ours).

The learned judge then showed that neither the nature, quality nor value of the land demised, nor the mode of enjoyment thereof (i. e., the purpose for which it was or might be used) was in any way affected by the residence of the workers employed, and then concluded:

> "The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named; . . . ."

*Vernon v. Smith*[28] was an action of covenant by the assign of the lessor against the lessee upon a covenant by the lessee and his assigns with the lessor and his assigns to insure the buildings then or thereafter erected upon the demised premises against fire, in the joint names of the defendant and of the lessor and his assigns. The statute of (1774) 14

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[24] See notes 1 and 2 *supra*.

[25] 15 C. J. 1240, note 51, where many authorities are collated.

[26] (1808, K. B.) 10 East, 130, 135. See also Bigelow, *The Content of Covenants in Leases* (1914) 12 MICH. L. REV. 639, reprinted in (1914) 30 L. QUART. REV. 319.

[27] See also *Hunt v. Danforth* (1856, C. C. D. R. I.) 2 Curt. 592; *Mesa Market Co. v. Crosby* (1909, C. C. A. 8th) 174 Fed. 96, 102.

[28] (1821) 5 Barn. & Ald. 1.

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Geo. 3, c. 78, provided that in case of fire the proceeds of the policy should be laid out in rebuilding the burned structures. The defendant demurred. The court (Abbot, C.J., Bayley, Holroyd, and Best, J.J.) unanimously overruled the demurrer.[29] In the course of his opinion Best, J., laid down the following test for the covenants which the law permits to run:[30]

"It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate,* and so directly within the principle on which covenants are made to run with the land."

To illustrate the test further, he put the case of a covenant to renew the lease, which is universally held to run,[31] and said:

"The covenant here mentioned is not beneficial to the estate granted, in the strict sense of the words, because it has no effect until that estate is at an end, but it is beneficial to the owner *as owner,* and to no other person. By the terms, *collateral covenants,* which do not pass to the assignee, are meant such as are beneficial to the lessor, without regard to his continuing owner of the estate. This principle will reconcile all the cases."

*Vyvyan v. Arthur*[32] was an action of covenant by the devisee of the lessor against the administratrix of the lessee upon a covenant by the lessee to yield certain rent and further to do suit to the mill of said lessor, his heirs and assigns, by grinding at said mill all corn which should be grown upon the demised premises during the term. The defendant demurred. The court (Bayley, Holroyd, and Best, J.J.) overruled the demurrer holding that the covenant in question was in the nature of a rent service.[33] Best, J., again states the test as follows:[34]

"The general principle is, that if the performance of the covenant be beneficial to the reversioner, in respect of the lessor's demand, and to no other person, his assignee may sue upon it; but if it be beneficial to

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[29] *Masury v. Southworth* (1859) 9 Ohio St. 340; *Thomas v. Vonkapff* (1834, Md.) 6 G. & J. 372; *Northern Trust Co. v. Snyder* (1896, C. C. A. 7th) 76 Fed. 34, *accord.*

[30] *Vernon v. Smith, supra.*

[31] See Abbot, *Leases and the Rule against Perpetuities* (1918) 27 YALE LAW JOURNAL, 878, 883-884, notes 17 to 21, and cases cited. *Leominster Gas Light Co. v. Hillery* (1908) 197 Mass. 267, 83 N. E. 870; *Lamson v. Coulson* (1920) 234 Mass. 288, 295, 125 N. E. 551, 554; *Warner v. Cochrane* (1904, C. C. A. 2d) 128 Fed. 553.

[32] (1823, K. B.) 1 Barn. & Cress. 410.

[33] This mode of construing the covenant as a rent service must be sparingly applied, otherwise almost any covenant which the landlord chooses to insert may be held to run as an additional rent, thereby abolishing the distinction between covenants which do touch and concern the land and those which do not. Cf. *Gower v. Postmaster-General* (1887, Ch.) 57 L. T. (N. S.) 527.

[34] *Vyvyan v. Arthur, supra,* at p. 417.

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the lessor, without regard to his continuing owner of the estate, it is a mere collateral covenant, upon which the assignee cannot sue."[85]

The test suggested in *Vernon v. Smith* and in *Vyvyan v. Arthur* is the complement of the test suggested in *Congleton v. Pattison*. Both tests turn upon *the effect of performance*. *Congleton v. Pattison* defines what effect performance of the covenant must have upon the property demised. *Vernon v. Smith* and *Vyvyan v. Arthur* define how performance must affect the covenantee. Yet if a covenant answer to the one test it will generally answer to the other. Usually performance of the covenant will not *directly affect the nature, quality or value of the thing demised, or the mode of occupying it or enjoying it without also affecting the owner, as owner,* that is, *affecting him through or by reason of his ownership of the property*. Similarly if performance of the covenant affects the owner *through or by reason of his ownership*, such performance will usually affect the property itself in one of the modes pointed out in *Congleton v. Pattison*. Yet the two tests are so different in form that each offers an excellent method of checking cases which are upon the border line of the other. If a covenant successfully passes both tests, it seems reasonably safe to assume that it does "touch or concern the thing demised."

No better illustrations could be found than *Congleton v. Pattison* and *Vyvyan v. Arthur*. It might be thought, perhaps, that a covenant which prescribed what persons could be employed upon the demised land, affected the mode of occupying or enjoying it. Yet such a covenant is in no sense beneficial to the lessor *as owner*. It might, indeed, be beneficial to the parish, *as a parish*, to require that only those who dwelt in the parish could be employed upon the land demised. But such a benefit was a benefit to the parish only in its capacity *as a municipal corporation*, and was of no value to it in its capacity *as landlord*. Hence the test of *Vernon v. Smith* demonstrates the soundness of the result reached in *Congleton v. Pattison*.

On the other hand, the test employed in *Congleton v. Pattison* throws considerable doubt upon the actual decision in *Vyvyan v. Arthur*. Undoubtedly, it was of *personal* benefit to the lessor that the corn grown upon the demised premises should be ground at his mill. But his ownership of the mill was, so far as appears, entirely independent of his ownership of the demised premises. It is difficult to perceive how performance of this covenant affected the demised land in any of the modes described in *Congleton v. Pattison*, unless we adopt the view of the court that such performance was in the nature of an additional rent.

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[85] This test was quoted or approved in the following cases: *Allen v. Culver* (1846, N. Y.) 3 Denio, 284; *Laffan v. Naglee* (1858) 9 Calif. 662; *Dyson v. Forster* [1909, H. L.] A. C. 98, 102.

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But if the landlord has sold the mill, he would clearly receive no benefit *as landlord* by insisting that the corn in question be ground at a mill which had passed into the hands of a stranger. Thus while the result in *Vyvyan v. Arthur* seems doubtful, and indeed, has been doubted,[36] the validity of the test laid down by Justice Best in that case, and in *Vernon v. Smith,* remains unshaken. The doubt as to the result in *Vyvyan v. Arthur* simply illustrates the wisdom of proving the result reached under that test by applying also the complementary test of *Congleton v. Pattison.*

In one respect the language of the *Vernon v. Smith* and *Vyvyan v. Arthur* test seems to require qualification. Literally applied, the language of that test would seem to make the running of the covenant depend on whether performance of the covenant was beneficial *to the lessor as owner of the reversion.* This is not unnatural since in both *Vernon v. Smith* and *Vyvyan v. Arthur* the plaintiff was either the lessor or an assign of the lessor. But the lessee is likewise owner of an interest in the land demised, namely, the leasehold. A covenant may run, if performance of it be beneficial to the lessee *as owner of the leasehold,* even though it be burdensome to the lessor as owner of the reversion. For example, an option to the lessee to renew the lease[37] or to purchase the reversion[38] may run. Both options are in operation burdensome to the lessor as owner of the reversion, since the lessee will not exercise them unless they are more favorable to him than any independent agreement which he can negotiate with the owner of the reversion. So, also, a covenant by the lessor to purchase at the expiration of the term such improvements as the lessee may have annexed to the soil may run,[39] although such a covenant is clearly burdensome to the owner

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[36] See *Gower v. Postmaster-General, supra* note 33, where it was held that an agreement to pay taxes *upon other land not included in the demise* was not an additional rent service and did not run.

[37] See note 28. Indeed, this is recognized in *Vernon v. Smith* (1821, K. B.) 5 Barn. & Ald. 1.

[38] *Prout v. Robey* (1872, U. S.) 15 Wall. 471; *Ankeny v. Richardson* (1911, C. C. A. 8th) 187 Fed. 550; *Hollander v. Central Metal Co.* (1908) 109 Md. 131, 71 Atl. 442; *Laffan v. Naglee* (1858) 9 Calif. 662; *Blakeman v. Miller* (1908) 136 Calif. 138, 68 Pac. 587; *Hagar v. Buck* (1872) 44 Vt. 285; *Sizer v. Clark* (1903) 116 Wis. 534, 93 N. W. 539; *Peters v. Stone* (1906) 193 Mass. 179, 186, 79 N. E. 336, 337 (*semble*). *Contra, Woodall v. Clifton* [1905] 2 Ch. 257; *Worthing Corp. v. Heather* [1906] 2 Ch. 532. In both the latter cases the option could be exercised at a period too remote under the letter of the rule against perpetuities. Perhaps the result might be supported on this ground, although the author is of opinion that the rule against perpetuities is inapplicable to such an option inserted in a lease, if the option must be exercised during the term. See Abbot, *op. cit.*, 27 YALE LAW JOURNAL, 878, 885; *Eastman Marble Co. v. Vermont Marble Co.* (1920) 236 Mass. 138, 156, 128 N. E. 177 (*semble*); *Battelle v. Worcester* (1920) 236 Mass. 395, 128 N. E. 631 and note 41 *infra.*

[39] *Mansel v. Norton* (1883, C. A.) L. R. 22 Ch. Div. 769; *Hunt v. Danforth*

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of the reversion, in that it compels him to purchase what would otherwise come to him without cost. Thus, while the principle of *Vernon v. Smith* and *Vyvyan v. Arthur* is clearly sound, the test itself should be more broadly phrased so as to include a covenant which is beneficial to the lessee *as owner of the leasehold,* even though that covenant be burdensome to the lessor as owner of the reversion. If any covenant which touches and concerns the land may be enforced as between assigns by reason of privity of estate, it is plainly immaterial whether the benefit of performance would have accrued, had there been no assignment, to the lessor as owner of the reversion or to the lessee as owner of the leasehold.

It must be noted, however, that the running of covenants, like the creation of covenants, will not be permitted to infringe upon positive rules of law or considerations of public policy. Thus, even though the covenant touches and concerns the land, it will not run if enforcement would violate the rule against perpetuities. An option to purchase the demised land manifestly touches and concerns the land itself, and so falls within the strictest limits of the tests which ordinarily govern the running of covenants.[40] There is conflict as to whether such as option, if exercisable during the term, will run when inserted in a lease for over twenty-one years.[41] It seems, however, to be clearly settled that if such an option, exercisable at a period too remote, be inserted in a deed,[42] it will not run. There is conflict as to whether such a covenant

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(1856, C. C. D. R. I.) 2 Curt. 592; *Purvis v. Shuman* (1916) 273 Ill. 286, 112 N. E. 679; *Frederick v. Callahan* (1875) 40 Iowa, 311; *Stockett v. Howard* (1870) 34 Md. 121; *Hollywood v. First Parish* (1906) 192 Mass. 269, 78 N. E. 124; *Conover v. Smith* (1864) 17 N. J. Eq. 51; *Lametti v. Anderson* (1826, N. Y.) 6 Cow. 302; *Douglaston Realty Co. v. Hess* (1908) 24 App. Div. 508, 108 N. Y. Supp. 1036; *Napier v. Darlington* (1871) 70 Pa. 64; *Ecke v. Fetzer* (1886) 65 Wis. 55, 26 N. W. 266. *Contra, Bream v. Dickerson* (1840, Tenn.) 2 Humph. 126. The following cases do not conflict, but rest upon the ground that the *intention* that the covenant *should* run was held not to have been sufficiently expressed. *Grey v. Cuthbertson* (1785) 2 Chit. 482 (overruled? *Mansell v. Norton, supra*); *Minshull v. Oakes* (1858, Exch.) 2 Hurl. & Norm. 793; *In re Robert Stephenson* [1915] 1 Ch. 802; see also *Ecke v. Fetzer, supra*); *Hansen v. Meyer* (1876) 81 Ill. 321 (overruled? *Purvis v. Shuman, supra*); *Thompson v. Rose* (1828, N. Y.) 8 Cow. 266; *Coffin v. Tallman* (1854) 8 N. Y. 465.

[40] See cases cited note 38 *supra.*

[41] It was specifically enforced in *Prout v. Robey, supra* note 38; *Hollander v. Central Metal Co., supra* note 38; *Hagar v. Buck, supra* note 38; see also *Eastman Marble Co. v. Vermont Marble Co., supra* note 38, at p. 156 (*semble*); *Battelle v. Worcester, supra* note 38; Abbot, *op. cit.,* 27 YALE LAW JOURNAL, 878. In England specific performance is denied. *Woodall v. Clifton, supra* note 38; *Worthing Corp. v. Heather, supra* note 38; Gray, *Perpetuities* (3d ed. 1915) sec. 230 b.

[42] *London & S. W. Ry. v. Gomm.* (1881) L. R. 20 Ch. Div. 562; *Trevelyan v. Trevelyan* (1885, Ch.) 53 L. T. (N. S.) 853; *H. J. Lewis Oyster Co. v. West*

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is good as against the original covenantor or his estate.[43] Consideration of the rule against perpetuities is beyond the scope of this article.[44] But the cases noted show that in determining what covenants the law will permit to run we must consider not only what covenants touch and concern the land, but also whether the running of the covenant, if permitted, will conflict with positive rules of law or considerations of public policy.

It may be suggested, however, that a distinction may be taken between leases and deeds. A lease defines the mutual relations of landlord and tenant. No considerations of public policy require that courts should be jealous of the running of covenants in leases, since any obligations or restrictions thereby imposed cannot in the ordinary case outlast the term. Different considerations apply in the case of a deed. If a covenant in a deed be held to run, it may restrict or burden the land conveyed for an indefinite period, thereby interfering with its free use and possibly imposing a very real restraint on alienation. Similar considerations may also apply to covenants in long leases which restrict or burden other land for the benefit of the land demised, since such covenants may measurably have the same effect as covenants inserted in deeds. But where the covenant in a lease applies only to the land demised, and must cease to affect it when the term expires, the courts may properly take a liberal view as to what covenants the law will permit to run.

## III

### COVENANTS RELATING TO OTHER LAND AND TO THINGS NOT IN BEING

It is not the purpose of this article to give an exhaustive list of covenants which the law permits to run. That is the function of a

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(1919) 93 Conn. 518, 107 Atl. 138; *Winsor v. Mills* (1892) 157 Mass. 362, 32 N. E. 352; *Hardy v. Galloway* (1892) 111 N. C. 519, 15 S. E. 890; *Barton v. Thaw* (1914) 246 Pa. 348, 92 Atl. 312; *Starcher v. Duty* (1907) 61 W. Va. 373, 56 S. E. 524; *Woodall v. Bruen* (1915) 76 W. Va. 193, 85 S. E. 170. The case of *Mineral Land & Imp. Co. v Bishop Mining Co.* (1916) 134 Minn. 412, 159 N. W. 966 seems to rest upon statute.

[43] In *Eastman Marble Co. v. Vermont Marble Co.* (1920) 236 Mass. 138, 128 N. E. 177, such an option, inserted in a deed, was held to be void as a restraint on alienation, but the case of a lease was expressly distinguished at p. 156. In *Worthing Corp. v. Heather* [1906] 2 Ch. 532, an option to purchase the reversion inserted in a lease for thirty years was held to be unenforceable in equity against an assign of the lessor, but damages were awarded against the estate of the covenantor. The two cases may perhaps be distinguished upon the ground that, in the first case, the option was inserted in a deed, and, in the second case, it was inserted in a lease. See *supra* note 38 and Abbot, *op. cit.*, 27 YALE LAW JOURNAL, 878.

[44] See Abbot, *op. cit.*, 27 YALE LAW JOURNAL, 878.

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digest or text book. It may not be without worth, however, to consider, for purposes of illustration, two classes of covenants which have caused some difficulty and confusion, namely, covenants relating to land other than that demised, and covenants relating to things not in being.

It is plain that even under the rule in *Spencer's Case* the subject matter of the covenant need not be the land demised. It is enough if the covenant touches and concerns the thing demised. *Congleton v. Pattison, Vernon v. Smith,* and *Vyvyan v. Arthur* make it clear that the true criterion is whether *performance of the covenant* affects the land. The first question, therefore, is whether a covenant to do something in relation to other land, or upon it, may so touch and concern the land demised that such a covenant may run.

In *Sampson v. Easterby*[45] one T, being the owner of certain mines, demised the same to defendant. The lease recited an agreement between the defendant and the owner of the mines to pull down and replace a certain smelter, which was used in connection with the mines, and which stood upon land not included in the demise. The lease contained a covenant by the lessee and his assigns, with the lessor and his assigns, to keep the new smelter in repair and so to leave it at the expiration of the term. The devisee of the assign of the lessor sued the lessee upon the latter covenant and the defendant demurred. The court overruled the demurrer, holding (1) that a covenant to build the new smelter should be implied, and (2) that even though the new smelter was to be placed upon land not included in the demise, it was so connected with the value and enjoyment of the mines that the covenant to build it and leave it in good repair could and did run.

In *Ricketts v. Enfield Church Wardens,*[46] the church wardens leased certain land to B, with a covenant by them and their assigns with B and his assigns not to build beyond a certain line upon the adjoining premises. B assigned to plaintiff, who sues upon the covenant. *Held,* that even though the covenant relates to the adjoining land it is for the benefit of, and so runs with, the land demised, and plaintiff may sue thereon.

In *Lyle v. Smith,*[47] the lessee of certain property covenanted for himself and his assigns, with the lessor and his assigns, to contribute to the repair of a sea wall, erected for the protection of the leased premises and other premises, but not upon the premises demised, in the proportion

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[45] (1829, K. B.) 9 Barn. & Cress. 505 affirmed *sub nom. Easterby v. Sampson* (1830, Exch. Ch.) 6 Bing. 644. Approved *Dewar v. Goodman* [1909, H. L.] A. C. 72, 77.

[46] [1909] 1 Ch. 544. See also *Thruston v. Minke* (1870) 32 Md. 487; *Clark v. Martin* (1865) 49 Pa. 289.

[47] [1909, K. B.] 2 Ir. Rep. 58. See also *Morland v. Cook* (1868) L. R. 6 Eq. Cas. 252, where a similar result was reached as to a similar covenant contained in a deed of partition.

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that the leased frontage bore to the total frontage. The action was brought to compel the assign of the lessee to contribute his proportion of the cost of such repairs. *Held,* that as the wall was for the benefit, support and maintenance of the thing demised, the covenant ran with the land demised and could be enforced against defendant.

Lack of space forbids setting out further cases to establish the proposition that a covenant touching land other than that demised may run.[48] It is enough to point out that each of the covenants above considered, two of which are affirmative and one negative, successfully passes the tests laid down in *Congleton v. Pattison, Vernon v. Smith,* and *Vyvyan v Arthur.* We pass on to consider several cases where the covenant touching other land was held to be collateral.

In *Thomas v. Hayward,*[49] the lessee covenanted for himself and his assigns to use the demised house for the sale of beer and spirits, and the lessor covenanted for himself and his assigns that, during the term, he would not build or keep or be interested in building or keeping any house for the sale of beer or spirits within half a mile of the demised premises. An assign of the lessee sued the lessor upon the latter covenant and the defendant demurred. *Held,* that the covenant in question concerned the business to be carried on upon the demised premises, rather than the land, and could not run.

In *Gower v. Postmaster-General,*[50] A, by an underlease, demised to B all the premises comprised in two head leases except certain premises previously demised to X by a prior underlease. B covenanted for himself and his assigns to pay all taxes which might be assessed, not only on the premises demised to him, but also on the premises previously

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[48] A considerable number of cases are collected in 12 C. J. 1240, note 52. See also *Morse v. Aldrich* (1837, Mass.) 19 Pick. 449; *Norman v. Wells* (1837, N. Y.) 17 Wend. 136; *Shaber v. St. Paul W. Co.* (1883) 30 Minn. 179.

[49] (1869) L. R. 4 Exch. 311. The case is significant as showing that the intention of the parties that the covenant shall run will not prevail if the covenant be of the kind which the law will not permit to run. *Congleton v. Pattison* (1808, K. B.) 10 East, 130 is another example. In view of the lessee's covenant the case seems to take a rather narrow ground. Cf. *Clegg v. Hands* (1890, C. A.) L. R. 44 Ch. Div. 503, which held that in a lease of a public house a convenant by the lessee and his assigns with the lessor and his assigns not to buy or sell any beer other than that bought of the lessor will run and may be enforced in equity by the assign of the lessor. In *Norman v. Wells supra,* A. demised a saw mill and covenanted not to establish another saw mill on the same mill stream. *Held,* that the covenant runs.

[50] (1887, Ch.) 57 L. T. (N. S.) 527. The plaintiff contended that the covenant to pay taxes upon the land, not demised to B, might be deemed an additional rent as in *Vyvyan v. Arthur.* The lease did not so provide and the contention was rejected. *Query,* as to how far covenants which would ordinarily be collateral might be made to run by providing that the rent should be a sum of money and performance of the act in question. Cf. *Barnard v. Godscall* (1612, K. B.) Cro. Jac. 309.

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demised to X. B assigned to the defendant. *Held,* that the covenant to pay taxes on the premises demised to X was collateral and did not run so as to bind the defendant.

In *Dewar v. Goodman,*[51] A, in 1820, made a head lease of a large tract of land to B, who covenanted for himself and assigns to repair all the buildings which might be erected on the premises during the term, with a provision for reentry by lessor in case of breach. Two hundred and eleven houses were so built. The head lease became vested in C, who demised two of the houses to D, and covenanted for himself and assigns with D and assigns to perform all the covenants of the head lease as to all the premises not included in the under lease. C assigned to Goodman (defendant) and D assigned to Dewar (plaintiff). Both Goodman and D permitted the two hundred and nine houses not included in the sublease to get out of repair, and A's assign, the head landlord, entered and terminated both head lease and sublease. Dewar sues Goodman upon the covenant to repair the two hundred and nine houses not included in the sublease, alleging that Goodman's breach of that covenant destroyed the sublease. The House of Lords, affirming the judgment below, held that the covenant to repair the two hundred and nine houses not included in the sublease was not a special covenant with the sublessee for quiet enjoyment, did not touch and concern the *land* demised to him by the sublease and, therefore, could not run. In other words, a covenant, the performance of which directly touches and concerns the *sublease,* may be collateral with respect to the *land* thereby demised. It may be observed that while the covenant in *Dewar v. Goodman* might pass the *Vernon v. Smith* test, it does not *directly* affect "the nature, quality or value of the thing demised nor the mode of occupying it" if that test be literally and narrowly applied, and so fails to pass the test laid down by *Congleton v. Pattison.* Putting aside the fact that the sublessee may lose his lease if the covenant be not performed, which might properly be taken care of by a covenant for quiet enjoyment, he derives no benefit from the repair of houses which do not stand on the demised premises. The case shows the value of the double test and is a striking example of the unwillingness of the English courts to extend the rule as to convenants running with the land. The court, however, recognizes that a covenant touching or to be performed upon land other than that demised is not as *matter of law* collateral in all cases, for Lord Collins says, at p. 77:

"I think counsel for defendant perhaps relied too much on the contention that privity of estate was not established between the plaintiff and defendant in the action in respect of the land on which the covenant of the sub-lessee was to be performed. No doubt privity of estate must exist between the assignee of the reversion and the assignee of the

[51] [1909, H. L.] A. C. 72, affirming [1908, C. A.] 1 K. B. 94.



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land demised, but privity of estate between the same parties is not vital in respect of the land on which the covenant is to be performed. The reason why the covenant to do something on land other than that demised presumably does not run is not because there is no privity of estate in the land on which the covenant is to be performed, but because such a covenant is prima facie collateral, i. e., does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it. Of this *Sampson v. Easterby* is an instance, if it be assumed, as it seems to have been, that no demise was to be implied of the site on the waste where the mill was to be built. . . . I agree with the Court of Appeal that *Sampson v. Easterby* is no authority for the running of the covenant in this case. It does decide that a covenant may run although there is no privity of estate in the land on which the covenant is to be performed, but it in no way supports the contention that the covenants in this case were other than collateral."

We turn to covenants, the subject matter of which is not in being. The distinction between covenants whose subject matter is in being and covenants whose subject matter is not in being is made by *Spencer's Case*. While the first resolution, if literally construed, might seem to indicate that a covenant whose subject matter is not in being—e. g., a covenant to build a new structure upon the demised premises—*cannot* run, the second resolution shows that this is not the case. It is settled that a covenant *may* run even though the subject matter of it is not in being. Thus, a covenant by the lessee to construct improvements and to surrender the same in good repair,[52] or a covenant to repair,[53] or to insure[54] improvements which may in the future be placed upon the land, may run. The same is true of a covenant to supply the demised premises with water[55] and of certain covenants by the lessee touching a railway to be built by him on the land demised.[56] So, also, a covenant by the lessor to purchase such improvements as may thereafter be placed by the lessee upon the demised premises may run with the land.[57] In

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[52] *Sampson v. Easterly* (1829, K. B.) 9 Barn. & Cress. 505, affirmed (Exch. Ch.) *sub non. Easterby v. Sampson* (1830) 6 Bing. 644; *Peters v. Stone* (1906) 193 Mass. 179, 79 N. E. 336; see also *Allen v. Culver* (1846, N. Y.) 3 Denio, 284; *Hayes v. New York M. Co.* (1874) 2 Colo. 273; *Magoon v. Eastman* (1912) 86 Vt. 261, 84 Atl. 869; *Dewar v. Goodman, supra* note 51.

[53] *Allen v. Culver, supra* note 52; *Coburn v. Goodall* (1887) 72 Calif. 498; *Magoon v. Eastman, supra* note 52; *Minshull v. Oakes* (1858, Exch.) 2 Hurl. & Norm. 793. But not buildings upon other land. *Dewar v. Goodman, supra* note 52.

[54] *Vernon v. Smith* (1821, K. B.) 5 Barn. & Ald. 1; *Masury v. Southworth* (1859) 9 Ohio St. 340; *Northern Trust Co. v. Snyder* (1896, C. C. A. 7th) 76 Fed. 34; see also *Thomas v. Vonkapff* (1834, Md.) 6 G. & J. 372.

[55] *Jourdain v. Wilson* (1821, K. B.) 4 Barn & Ald. 266.

[56] *Hemingway v. Fernandes* (1842, Ch.) 13 Sim. 228.

[57] See *supra* note 39.

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all these cases the covenants may run although the subject matter of the covenant is not the land and is not in being when the covenant is made.

Performance of each of these covenants intimately affects the land. Every one of them passes both the test laid down by *Congleton v. Pattison* and also the test laid down by *Vernon v. Smith* and *Vyvyan v. Arthur*. Indeed, the subject matter of the covenant in both the latter cases was neither the land itself nor a thing in being at the time the covenant was made. In *Vernon v. Smith* the covenant was to insure buildings which might in future be placed upon the land, while in *Vyvyan v. Arthur* the subject matter of the covenant was corn which might be grown thereafter upon the demised premises. It is evident therefore, that in determining whether the covenant is of such a character that the law *will permit it to run with the land,* the question whether the subject matter of the covenant is, or is not, in being is not decisive. The controlling fact is *the effect of performance.* If that passes the tests laid down by *Congleton v. Pattison* and *Vernon v. Smith* it may ordinarily be assumed that the covenant is one which the law permits to run, even though the subject matter of it be other land or a thing not yet in being.

## IV

### THE INTENTION OF THE PARTIES THAT THE COVENANT SHALL RUN

If the covenant be one which the law permits to run, the question whether it shall run is one of intention. Although an express provision that the covenant shall run will not avail if the covenant be collateral,[58] the law does not require that any covenant shall run against the will of the parties to the lease. As the question whether a covenant which in law may run, shall run, is purely one of intention, we should expect that that intention would be collected from the entire instrument construed in the light of the circumstances under which it was made. Such seems to be the law in a few advanced jurisdictions.[59] But much confusion as to this question of intention has been caused by the distinction taken in the first and second resolutions in *Spencer's Case.*

The first resolution declares that "where the covenant extends to a thing *in esse,* parcel of the demise . . . . [it] shall bind the assignee although he be not bound by express words." The second resolution

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[58] See, for example, *Congleton v. Pattison* (1808, K. B.) 10 East, 130; *Thomas v. Hayward* (1869) L. R. 4 Exch. 311; *Dewar v. Goodman* [1909, H. L.] A. C. 72.

[59] *Purvis v. Shuman* (1916) 273 Ill. 286, 294, 112 N. E. 679; *Sexauer v. Wilson* (1907) 136 Iowa, 357, 362, 113 N. W. 941; *Peters v. Stone* (1906) 193 Mass. 179, 185, 79 N. E. 336, 337; *Hollywood v. First Parish* (1906) 192 Mass. 269, 78 N. E. 124; *Masury v. Southworth* (1859) 9 Ohio St. 340, 359.

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declares that a covenant to "make a new wall upon some part of the thing demised . . . shall bind the assignee by express words." These two resolutions distinguish covenants which may run into two groups, namely, covenants as to a thing in being and covenants to make new things in the future. According to *Spencer's Case,* "express words" are not required to bind assigns to perform covenants of the first class, while "express words" are required to bind assigns to perform covenants of the second class. Thus, the effect of these two resolutions seems to be that, if the covenant relates to a thing in being, the intention that it shall run is presumed to exist unless rebutted, while, if the covenant relates to a thing not in being, the intention that it shall not run is presumed unless the intention that it shall run is declared by "express words." So considered, these two resolutions seem to lay down two rules of construction which assume, in the absence of "express words," that the intention that the covenant shall or shall not run depends upon whether the subject matter of the covenant is or is not in being.

In the last analysis, intention is a question of fact. A rule of construction establishes a presumption as to that fact. But a presumption may easily be misused to defeat intention rather than as a means of determining intention. If the presumption be flung into the scale in the first instance, and then the instrument be examined to ascertain whether the language thereof is sufficiently clear to rebut the presumption, there is much danger that an *a priori* conception of the court may be substituted for the actual intention of the parties to the instrument. If, on the other hand, the instrument be first examined in the light of all the circumstances and the presumption be resorted to only when the scales hang even, it performs a legitimate function in substituting a definite make-weight to determine what would otherwise be a mere guess.

The question whether a covenant which may run is intended to run is simply the question whether the covenant is intended to enure to and bind all the persons who may from time to time occupy respectively the position of landlord and of tenant of the demised premises, or whether it is intended to be personal to the original parties to the lease. The fact that it is inserted in the lease is a circumstance which in and of itself would seem to indicate that it was intended to govern all who might occupy the mutual relation of landlord and tenant. The first resolution recognizes and gives effect to this natural assumption as to intention in all cases where the subject matter of the covenant is in existence when the lease was made. Broadly speaking, it seems to be the accepted rule in most jurisdictions. The second resolution apparently assumes that a covenant which may run is nevertheless intended to be personal if it relates to a thing not in being, unless the parties declare a contrary intention by express words. There seems to be no logical basis for this

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assumption, and it has been severely criticized.[60] But it must be admitted that the authority of the second resolution in *Spencer's Case* has not spent its force in many jurisdictions,[61] although the tendency seems to be to restrict it to its precise facts, viz., an absolute covenant to make a new thing, and to escape from it where possible.[62]

The tendency to restrict the second resolution so far as may be appears in a variety of forms. Some courts have been very astute to discover that the covenant related in some aspect to a thing in being, and so fell within the first resolution.[63] In England, the case of *Grey v. Cuthbertson*[64] held that a covenant to buy such bushes as might be on the land at the expiration of the lease would not run where assigns were not named, but this case seems to be much shaken, if not overruled, by *Minshull v. Oakes*,[65] which held that a covenant to repair such buildings as were or might be placed on the land would run even though assigns were not expressly bound. The latter case confined the second resolution in *Spencer's Case* to an absolute covenant to make a new thing, and distinguished it from a covenant which was contingent upon the existence of the future buildings to which it related. *Minshull v. Oakes* has been followed in many American jurisdictions[66] but there is a case to the contrary in Tennessee.[67] In Illinois, *Hansen v. Meyer*[68] followed *Grey v. Cuthbertson* but seems to be shaken, if not overruled, by *Purvis v. Shuman*.[69] When these cases are considered with those which frankly criticize the rule of construction laid down by the second resolution as illogical[70] and with those which adopt what appears to be the sounder

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[60] *Masury v. Southworth, supra* note 59; *Sexauer v. Wilson, supra* note 59; *Purvis v. Shuman, supra* note 59; *Minshull v. Oakes* (1858, Exch.) 2 Hurl. & Norm. 793; *Bald Eagle Ry. v. Nittany, etc. Ry.* (1895) 171 Pa. 284, 294, 33 Atl. 239.

[61] *Doughty v. Bowman* (1848, Exch.) 11 Q. B. 444; *Coffin v. Tallman* (1854) 8 N. Y. 465.

[62] *Minshull v. Oakes* (1858, Exch.) 2 Hurl. & Norm. 793; *In re Robert Stephenson* [1915] 1 Ch. 802; *Purvis v. Shuman, supra* note 59; *Sexauer v. Wilson, supra* note 59; *Peters v. Stone, supra* note 59; *Conover v. Smith* (1864) 17 N. J. Eq. 51; *Masury v. Southworth, supra* note 59; *Napier v. Darlington* (1871) 70 Pa. 64; *Ecke v. Fetzer* (1886) 65 Wis. 55, 26 N. W. 266; *Northern T. Co. v. Snyder* (1896, C. C. A. 7th) 76 Fed. 34; *Tuttle v. Leiter* (1897, C. C. N. D. Ill.) 82 Fed. 947.

[63] See, for example, *Woodruff v. Trenton Water P. Co.* (1856) 10 N. J. Eq. 489, 505; *Winfield v. Heming* (1870) 21 N. J. Eq. 188, 189; *Allen v. Culver* (1846, N. Y.) 3 Denio, 284.

[64] (1785) 2 Chit. 482.

[65] See note 62 *supra*.

[66] See notes 57 and 39 *supra*.

[67] *Bream v. Dickerson* (1840, Tenn.) 2 Humph. 126.

[68] (1876) 81 Ill. 321.

[69] (1916) 273 Ill. 286, 112 N. E. 670.

[70] See note 60 *supra*.

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rule, that the intention as to whether the covenant shall run is to be ascertained from the whole instrument,[71] it seems plain that the rule of construction declared by the second resolution is on the defensive and may ultimately be overthrown altogether.

Another proof that the rule of construction declared by the second resolution is to be avoided rather than enforced is the readiness of many courts to discover some language in the covenant which is broad enough to include and bind assigns. Even *Spencer's Case* does not require that the word "assigns" be employed as a word of art;[72] the second resolution requires only that assigns be bound by "express words." Thus, a provision that the words "lessor" and "lessee" shall be held to include the "assigns" of each is enough.[73] The use of the word "assigns" in another covenant,[74] or in the *habendum* clause[75] of a lease for fifty years, has been held sufficient. So, also, the words "heirs, executors and administrators"[76] or "lessor and those claiming under him"[77] or even "legal representatives"[78] have all been held to be broad enough to include "assigns," while several cases have collected from the entire lease the intent that a covenant whose subject matter was not in being should run, although neither the word "assigns" nor any equivalent words were employed.[79] These cases are a further illustration that modern courts are astute to avoid the rule of construction laid down by the second resolution, if they have adequate reason to believe that that rule would defeat rather than effectuate the intent of the parties to the lease.

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[71] See note 59 *supra*.

[72] "Assigns" is not a word of art like "heirs" in a deed. *Sexauer v. Wilson* (1907) 136 Iowa, 357, 363, 113 N. W. 941; *Masury v. Southworth* (1859) 9 Ohio St. 340, 350.

[73] *Clegg v. Hands* (1890, C. A.) L. R. 44 Ch. Div. 503.

[74] *In re Robert Stephenson Co.* [1915] 1 Ch. 802, 807.

[75] *Hollywood v. First Parish* (1906) 192 Mass. 269, 78 N. E. 124.

[76] *Ankeny v. Richardson* (1911, C. C. A. 8th) 187 Fed. 550.

[77] *Stockett v. Howard* (1870) 34 Md. 121.

[78] *Douglaston Realty Co. v. Hess* (1908) 124 App. Div. 508, 108 N. Y. Supp. 1036; see also *New York Mut. Life Ins. Co. v. Armstrong* (1885) 117 U. S. 591, 597, 6 Sup. Ct. 877; *Wilckens v. Wilckens* (1914, C. C. A. 8th) 217 Fed. 508.

[79] *Peters v. Stone* (1906) 193 Mass. 179, 79 N. E. 336; *Northern T. Co. v. Snyder* (1896, C. C. A. 7th) 75 Fed. 34; *Tuttle v. Leiter* (1897, C. C. N. D. Ill.) 82 Fed. 947; cf. also cases cited under note 61 *supra*.

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